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A SELECTION OF CASES
ON THE
LAW OF QUASI-CONTRACTS.

BY
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VOLUME II.

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CASES ON QUASI-CONTRACTS.

CHAPTER II.

FAILURE OF CONSIDERATION.

(Continued.)

SECTION II.

FAILURE OF DEFENDANT TO PERFORM CONTRACT.

(Continued.)

(c.) *Defendant relying on Illegality of Contract.*

JAKES *v.* GOLIGHTLY.

IN THE COMMON PLEAS, EASTER TERM, 1776.

[Reported in 2 William Blackstone, 1073.]

CASE, for money had and received to the plaintiff's use. A verdict for the plaintiff; damages 64*l.* 17*s.* 6*d.* On motion for a new trial, DE GREY, C. J., reported that on the 1st of January, 1775, the plaintiff insured many lottery tickets in various manners at the defendant's office. The whole amount of the premiums by him paid was 64*l.* 17*s.* 6*d.* Upon some of the chances the plaintiff was a loser, in more a winner. The balance due to him was 90*l.* This the defendant refused to pay, alleging that the insuring was illegal, but insisted on retaining the premiums.

Glyn and Walker for the defendant.

Davy for the plaintiff.

DE GREY, C. J. This is an application for favor by a man knowingly transgressing. He says, and says rightly, that the insurance contract was null and void. He has therefore a scruple in conscience not to pay the money won by the plaintiff, because the play was illegal; but he has no scruple to receive and retain the consideration money. I think the verdict right.

GOULD, J., of the same opinion.

BLACKSTONE, J., of the same opinion. These Lottery Acts differ from the Stockjobbing Act, of the 7 Geo. 2, c. 8, because there both parties are made criminal and subject to penalties; but the losing party is indemnified from

those penalties in case he sues and recovers back the money lost from the winner. It was therefore necessary in the preceding clause to give the loser a power to maintain such an action. But here (on the part of the insured) the contract on which he has paid his money is not criminal, but merely void; and therefore, having advanced his premium without any consideration, he is entitled to recover it back. In the case of *Faikney v. Reynous and Richardson*,¹ one partner in a stock-jobbing contract lent the other 1500*l.* to pay his moiety of the differences on the rescouter day; and though this was pleaded to the bond, the plaintiff recovered.

NARES, J., of the same opinion, and cited *Alcinbrook v. Hall*,² wherein money lent to pay a bet at a horse-race was recovered.

Rule discharged.

VANDYCK AND OTHERS v. HEWITT.

IN THE KING'S BENCH, NOVEMBER 24, 1800.

[*Reported in 1 East, 96.*]

THE plaintiff declared upon a policy of insurance on goods at and from London to Embden or Amsterdam, at a premium of ten guineas per cent to return five upon their arrival at the place of destination; with an averment that the insurance was made for the benefit of certain persons therein named; and then declared as upon a loss by capture in the course of the voyage insured. The declaration also contained counts for money paid and for money had and received.

The goods were shipped on board a Prussian neutral vessel, on account partly of the plaintiffs, who were naturalized foreigners resident in London, and partly of certain other persons, aliens, then resident in Holland. At the trial at Guildhall the insurance itself was abandoned on the ground of its being intended to cover a trading with an enemy's country, Holland being at the time of such insurance in a state of hostility with this kingdom; and therefore falling within the decision of the case of *Potts v. Bell*; ³ but it was contended that the plaintiffs were entitled to recover back the premium, because the policy never attached, and consequently the defendant's risk never commenced. Lord KENYON permitted a verdict to be taken for the plaintiff for that amount, with liberty to the defendant's counsel to move to set that aside and to enter a verdict for the defendant. A rule *nisi* was accordingly obtained on a former day in this term for that purpose; against which

Erskine, Park, and J. Warren, now showed cause.

Law and Garrow contra, were stopped by the court.

¹ 1 P. 7 Geo. 3 B. R.

² 1 P. 6 Geo. 3 C. B. 2 Wils. 369.

³ 8 T. R. 548.

Lord KENYON, C. J. There is no distinguishing this on principle from the common case of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country he cannot recover back the goods themselves or the value of them. The rule has been settled at all times, that where both parties are *in pari delicto*, which is the case here, *potior est conditio possidentis*.¹

Per Curiam, Rule absolute for the verdict to be entered for the defendant.

MORCK AND ANOTHER v. ABEL.

IN THE COMMON PLEAS, FEBRUARY 9, 1802.

[Reported in 3 Bosanquet & Puller, 35.]

THIS was an action on a policy of insurance effected on the 26th July, 1797, on goods on board the Juliana Maria, warranted Danish ship and property, "at and from Bengal and all and every port or place wheresoever and whatsoever, as well on the other side as at and on this side the Cape of Good Hope, in port and at sea, in all places and at all times, with liberty to touch, stay, and trade, load and unload and reload, at all and any of the said ports and places, until the ship's arrival at Copenhagen." The declaration alleged that the cargo was put on board at Calcutta in Bengal, that the plaintiffs were interested, and that the ship and cargo were afterwards captured "by certain then enemies of our Lord the King."

The cause was tried before Lord ALVANLEY, C. J., at the Guildhall sittings after last Michaelmas term, when it appeared that the plaintiffs were subjects of Denmark and resident in Copenhagen, and the ship Juliana Maria a Danish ship; that the cargo which was the subject of the present insurance was taken on board at Calcutta on the 5th March, 1797; and that the ship and cargo on the voyage from Calcutta to Copenhagen were captured by the French and condemned as prize. An objection was taken to the plaintiff's recovery on the ground of its being illegal, under the provisions of the 12 Car. 2, c. 18, s. 1, to export goods from Calcutta in any ship not belonging to a British subject; and, this objection prevailing, the plaintiffs then insisted that if the exportation from Calcutta were illegal, the risk never commenced, and that the plaintiffs therefore were entitled to a return of premium. The jury were directed by his Lordship to find a verdict for the plaintiffs, liberty being reserved to the defendant to move that such verdict might be set aside, and a nonsuit be entered.

Accordingly, a rule *nisi* for that purpose having been obtained, *Shepherd* and *Best*, Serjts., now showed cause.

Vaughan, Serjt., *contra*.

¹ LE BLANC, J., delivered a concurring opinion. — ED.

Lord ALVANLEY, C. J. Unfortunately this policy was effected previous to the passing of the 37 Geo. 3; and though I believe that before the passing of that statute the provisions of the navigation laws had been relaxed in practice with respect to foreigners, still in a court of law the plaintiffs are not entitled to recover if the trading in question contravened the regulations of that act. The point however upon which this case comes before the court is, whether there be any difference between this case and that of *Vandyck v. Hewitt*? Undoubtedly that was a case in which the trading was in direct violation of the common law of this country, but before that decision took place, many of the distinctions which had been taken between immoral and illegal contracts had been considerably shaken; and the principle which I think must now be extracted from the cases upon this subject is, that no man can come into a British court of justice to seek the assistance of the law who founds his claim upon a contravention of the British laws. Let us consider then what this policy is. It is an insurance upon a voyage from any part of Bengal to Copenhagen. The underwriter contends, that large as the policy is, still it is the business of the assured to take care that he takes in his cargo at some port in India where he may legally do so. The assured having loaded at Calcutta, has not attended to that restriction, but has thereby contravened the navigation act. Capture being one of the losses insured against, the assured has claimed an indemnity upon that ground: to which the British underwriter answers, you had no right to take in your cargo at a British settlement, and therefore he refuses to pay. The assured sets up a distinction in his own favor upon the ground of his being a foreigner, and urges that although he may have contravened the British laws, he has done so from ignorance only. But even looking at the case in this point of view I do not think the plaintiff is taken out of the general rule applicable to cases where a party enters into an illegal contract. The case of *Andrée v. Fletcher*¹ is a very strong authority, for there it was holden that a foreigner could not recover back the premium paid on a policy which was illegal according to the laws of this country. The question here is, whether the plaintiff, having contravened the British laws, can recover by the aid of those laws? and after consideration of all the cases, I am of opinion that he cannot recover, and that the defendant is entitled to have a nonsuit entered.

ROOKE, J. I consider the point made in this case as having been decided in the case of *Andrée v. Fletcher*,¹ and I do not see any reason to differ from that authority. If the assured, instead of seeking to recover for a total loss, had in the first instance stated to the underwriters that as the cargo was loaded from Calcutta they had no right to recover upon the policy, and therefore sought a return of premium, there might have been some pretence for the claim which he has made: but instead of adopting this line of conduct they have first endeavored to affirm the contract by

¹ 3 T. R. 266.

making a demand for a total loss, and failing in that, they now disaffirm the contract and seek a return of premium. But it appears to me that they are not entitled to succeed, for having acted in defiance of the laws of this country they shall not have the assistance of those laws to enable them to recover.

CHAMBRE, J. I am of the same opinion. It is perfectly settled that in the case of an illegal contract neither party can recover from the other money paid upon that contract; and that rule must prevail in the present case, unless the plaintiffs can establish a distinction in their own favor on the ground of being foreigners and ignorant of our laws. But I think that we ought not to relax the rigor of our great political regulations in favor of foreigners offending against them, and that there is very little reason to presume ignorance of a law peculiarly applicable to the subjects of foreign states. Upon the whole therefore I am of opinion that the plaintiffs are not entitled to recover back the premium.

Rule absolute.

HENTIG v. STANIFORTH.

IN THE KING'S BENCH, MAY 20, 1816.

[Reported in 5 Maule & Selwyn, 122.]

THIS case was argued on a former day in this term, by the *attorney-General*, Gaselee, and F. Pollock, for the plaintiffs; and by Scarlett and Barnewall, for the defendant. The case of *Oom v. Bruce*,¹ was mainly relied on for the plaintiffs; and those of *Andrée v. Fletcher*,² *Morek v. Abel*,³ *Lubbock v. Potts*,⁴ *Toulmin v. Anderson*,⁵ *Cowie v. Barber*,⁶ *Vanhartals v. Halhed*,⁷ for the defendants.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J., on this day delivered the judgment of the court. This was an action for money had and received, to recover back the premium that had been paid on a policy of insurance. The cause was tried before me at Guildhall, and the facts as stated by the plaintiffs' counsel, and which were admitted without proof, were these: The policy was dated on the 20th of November, and was on goods at and from Riga to Hull. The ship, which was a Swedish ship, was chartered for the voyage; and by the terms of the charter-party a British license for the voyage was to be procured. On the 3d of September a letter was written and sent from Riga to the agent of the assured in England, directing him to procure a license and to effect insurance. The letter was delayed beyond the usual time by contrary winds, and was not received till the 5th of October. On the 7th of October a license was obtained. The ship sailed from Riga

¹ 12 East, 225.

² 3 T. R. 266.

³ 3 B. & P. 35.

⁴ 7 East, 449.

⁵ 1 Taunt. 227.

⁶ 4 M. & S. 16.

⁷ 1 East, 487, n.

on the 3d. It was objected, that this was an illegal voyage, by the stat. 12 Car. 2. c. 18, s. 8, the ship being Swedish, and the goods the produce of Russia, and that the plaintiff being *particeps criminis* could not recover back the premium. A verdict was taken for the plaintiff, with liberty to the defendant to move to set it aside and enter a nonsuit. Such a motion was accordingly made, and a rule to show cause granted, and the matter has been argued. Upon consideration, we think the plaintiff is entitled to recover back the premium, on the principle of the decision of *Oom v. Bruce*.¹ The objection is, that the contract was illegal, the voyage insured being for the conveyance of Russian commodities from Russia to England in a Swedish ship, and so contrary to the navigation act, 12 Car. 2, c. 18, s. 8; and that the plaintiff being *particeps criminis* cannot recover back the money paid on the illegal consideration. But before the time of this insurance, a statute had passed enabling His Majesty to legalize such a voyage by license; and in fact a license had been granted before the policy was effected, though not until four days after the ship sailed, the ship having sailed on the 3d of October, and the license being dated on, and expressly made to be in force from the 7th of that month. The ship having sailed before the license was granted, it has been decided, and rightly so, that the policy was void. No risk, therefore, was ever incurred by the underwriter, and if he can retain the premium he will retain it for nothing. But though the license was not actually obtained until the 7th of October, it was always in the contemplation of the parties, that a license should be obtained; the charter-party provides for it, and a letter directing it to be obtained was sent from Riga, on the 3d of September, which, according to the ordinary course, might be expected to have arrived in England in time for a license to be procured before the third of October, the day of the ship's departure. If the license had been obtained before the ship's departure, the voyage would have been legal. The plaintiff residing abroad had reasonable ground to suppose that the license would be obtained before the ship sailed: he contemplated a legal and not an illegal voyage. His agent in England knew that the license was obtained, but was ignorant of the time of the ship's departure; he also contemplated a legal and not an illegal voyage. The illegality depended upon a fact, viz., the posteriority of the license to the ship's departure, which was not known to the parties, and was contrary to the opinion and expectation that the plaintiff might reasonably entertain. In this respect, the present case is in principle the same as *Oom v. Bruce*; there the illegality of the voyage arose out of the commencement of hostilities on the part of Russia, which was a fact unknown to the plaintiffs when they effected the policy. It was urged in argument, for the purpose of distinguishing the two cases, that here the voyage was *prima facie* illegal, because a license was necessary to legalize it. But there is nothing of illegality apparent on the face

¹ 12 East, 225

of the policy, and as far as the plaintiff's knowledge of the facts, coupled with the circumstance of the expected license, appears to have extended, he had a right to suppose that the voyage would be legal: there was no illegality apparent to him or to his agent. We think, therefore, that this distinction does not exist. But the case is plainly distinguishable from all the cases cited on the part of the defendant, wherein the return of premium was called in question. In *Toulmin v. Anderson*,¹ no question on the return of premium was ever made. In all the other cases cited the voyages were illegal; and there was not in any one of them any state of facts, either actually existing or supposed to exist, that could render it legal. In the present case, a state of facts was supposed to exist, and reasonably so supposed, under which, if the expectation of the parties had been realized, the voyage would have been legal. Unfortunately for the plaintiff his expectation was disappointed, and he lost the benefit of his insurance; but he contemplated a legal voyage and a legal contract. And we think, therefore, that he is not a party to a violation of the law, and is entitled to recover back his premium, as money paid without any consideration.

Rule to be discharged.

BLOXSOME v. WILLIAMS.

IN THE KING'S BENCH, TRINITY TERM, 1824.

[Reported in 3 Barnewall & Creswell, 232.]

ASSUMPSIT for breach of the warranty of a horse, with the money counts. Plea, *non assumpsit*. At the trial before PARK, J., at the last Spring assizes for the county of Berks, 1823, it appeared that the defendant was the proprietor of a stage-coach, and a horse-dealer. The plaintiff's son was travelling on a Sunday in defendant's coach, and while the horses were changing made a verbal bargain with the defendant for the horse in question for the price of thirty-nine guineas; the latter warranted the horse to be sound, and not more than seven years old. The horse was delivered to the plaintiff on the following Tuesday, and the price was then paid; there was no evidence to show that the plaintiff's son knew at the time when he made the bargain that the defendant exercised the trade of a horse-dealer. The horse was unsound and seventeen years old. It was objected on the part of the defendant that the plaintiff could not recover, on the ground that the bargain, having been made on a Sunday, was void within the 29 Car. 2, c. 7, s. 2; the learned judge overruled the objection, and the plaintiff obtained a verdict for the price of the horse. A rule nisi having been obtained in the following term for a new trial. —

W. E. Taunton and *Talfourd* now showed cause.

Jervis and *G. R. Cross*, *contra*.

¹ 1 Taunt. 227.

BAYLEY, J. The statute 29 Car. 2, c. 7, s. 1 enacts, that no tradesman, artificer, workman, colorer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, and that every person, being of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit five shillings. In *Drury v. Defontaine*¹ it was held that the vendor of a horse who made a contract of sale on a Sunday, but not in the exercise of his ordinary calling, might recover the price. I entirely concur in that decision, but I entertain some doubts whether the statute applies at all to a bargain of this description. I incline to think that it applies to manual labor and other work visibly laborious, and the keeping of open shops. But I do not mean to pronounce any decision upon that point; my judgment in this case proceeds upon two grounds; first, that there was no complete contract on the Sunday, and secondly, assuming that there was, that it is not competent to the defendant, who alone has been guilty of a breach of the law, to set up his own contravention of the law as an answer to this action at the suit of an innocent person. As to the first point the statute of frauds enacts, "that no contract for the sale of goods, etc., shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or that some note or memorandum in writing of the bargain be made." Now in this case there was no note in writing of the bargain, and on the Sunday all rested in parol, and nothing was done to bind the bargain. The contract, therefore, was not valid until the horse was delivered to and accepted by the defendant. The terms on which the sale was afterwards to take place were only specified on the Sunday, and those terms were incorporated in the sale made on the subsequent day. Assuming, however, that the contract was perfect on the Sunday, the defendant was the person offending within the meaning of the statute by exercising his ordinary calling on the Sunday. He might be thereby deprived of any right to sue upon a contract so illegally made, and upon the same principle any other person knowingly aiding him in the breach of the law, by becoming a party to such a contract, with the knowledge that it was illegal, could not sue upon it. But in this case the fact that the defendant was a dealer in horses was not known to the plaintiff or his son; he therefore has not knowingly concurred in aiding the defendant to offend the law; and that being so, it is not competent to the defendant to set up his own breach of the law as an answer to this action. If the contract be void as falling within the statute, then the plaintiff, who is not a *particeps criminis*, may recover back his money, because it was paid on a consideration which has failed. For these reasons I think this rule must be discharged.

HOLROYD and LITTLEDALE, JJ., concurred.

Rule discharged.

¹ 1 Taunt. 131.

SIMPSON v. NICHOLLS.

IN THE EXCHEQUER, HILARY TERM, 1838.

[Reported in 3 Meeson & Welsby, 240.]

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea, as to the sum of 18s. 6d., parcel, &c. *actionem non*, because the goods, the price and value whereof amounted to the sum of 18s. 6d., parcel of the money in the first count mentioned, at the time of the sale and delivery thereof, consisted of certain wines and goods, to wit, two bottles of port, etc.; and that the plaintiff, before and at the time of the sale and delivery thereof, carried on the trade and business of a wine-merchant, and the said goods were so sold and delivered by the plaintiff to the defendant on Sunday, the 1st day of March, 1835, and in the way of the plaintiff's said trade and business, and in his ordinary calling of a wine-merchant; and the said promise to pay the price and value thereof was made on that day by the defendant to the plaintiff, in the way of the plaintiff's said trade and business, etc., upon the said Sunday, such sale or delivery not being a work of necessity or of charity, and contrary to the statute, etc. And that the sum of 18s. 6d., parcel of the money in the last count mentioned as found to be due from the defendant to the plaintiff, and an account whereof was so stated as aforesaid, was so found to be due, and was and is the said sum of 18s. 6d., in which the defendant is supposed to be indebted to the plaintiff for and in respect of the said goods so sold and delivered on a Sunday as aforesaid. Verification.¹

Replication, as to so much of the plea as relates to the said sum of 18s. 6d., parcel of the money in the first count mentioned, *precludi non*, because although the said goods were sold and delivered by the plaintiff to the defendant at the time and in the manner in the plea alleged, yet the defendant, after the sale and delivery of the said goods, kept and retained the same, and hath ever since kept and retained the same, for his own use and benefit, without in any manner returning or offering to return the same to the plaintiff, and thereby hath become liable to pay to the plaintiff the said sum of 18s. 6d., the same being so much as the said goods were and are reasonably worth: And as to so much and such part of the plea as relates to the said sum of 18s. 6d., parcel of the said sum of money in the second count mentioned, *precludi non*, because, although the said sum of 18s. 6d. was found to be due from the defendant to the plaintiff upon an account stated between them, as by the defendant in that behalf alleged,

¹ There was a similar plea as to 6l. 0s. 6d., other parcel, etc., alleging that it was the price of goods sold on Sunday, the 24th May, 1835; which was also followed by a replication, demurrer, etc., in the same terms as those stated in the text.

yet that the said account in the second count of the declaration mentioned was stated between the plaintiff and the defendant upon a different and subsequent day, to wit, upon the 25th day of April, 1835, the same not being the Lord's Day or Sunday; and upon that accounting the defendant was then found to be indebted to the plaintiff, and in consideration thereof then promised the plaintiff to pay him the said sum of 18s. 6d., parcel of the monies in the second count of the declaration mentioned as aforesaid, in manner and form as the plaintiff hath in his declaration in that behalf alleged, etc.

Special demurrer to the replication to so much of the plea as related to the said sum of 18s. 6d., parcel of the monies in the first count mentioned; assigning for causes, that the replication neither traversed or denied, nor confessed and avoided, the matters in the plea alleged; and that the plaintiff had not stated or shown that the defendant made a fresh promise to pay the plaintiff the said sum of 18s. 6d.; and that the matters pleaded in the replication might and ought to have been pleaded by a formal traverse of the sale and delivery having taken place on a Sunday; and that the replication was a departure from the first count of the declaration, and, to have enabled the plaintiff to have recovered on the matters contained therein, he ought to have declared specially.

To the replication, so far as it related to the 18s. 6d., pleaded to as part of the monies mentioned in the second count of the declaration, the defendant rejoined, denying that the account was stated on a different or subsequent day to the Sunday on which the goods were sold and delivered as in the plea mentioned.

The demurrer was now argued by —

Martin, for the defendant.

Curzon, for the plaintiff.

LORD ABINGER, C. B. — I think the replication is bad.

PARKE, B. — The replication is certainly bad: for, even supposing *Williams v. Paul*¹ to be good law (and in one point of view, which has not been adverted to, it may perhaps be supported, viz., that though the contract is illegal, being made on a Sunday, the property in the goods passes,² although no action can be maintained for them), yet the plaintiff has not brought himself within the decision in that case, which proceeded on the ground that there was an express promise to pay, after the retention of the goods. The replication should therefore have stated an express promise by the defendant, after the retention of the goods on the Monday, and, not having done so, it is clearly bad.³

HOLLAND, B., and GURNLY, B., concurred.

Judgment for the defendant.

¹ 6 Bing. 653.

² *Greene v. Goffrey*, 41 Me. 25; *Horton v. Bullington*, 105 Mass. 399, *accord.*; *Winfield v. Dodge*, 45 Mich. 355, *contra.* — *Id.*

³ The reporters have been informed that they were under a misconception in attributing to Baron PARKE, in his judgment in the above case, the expression of an opinion

In re CORK AND YOUGHAL RAILWAY COMPANY.

IN CHANCERY, BEFORE LORD HATHERLEY, L. C., AND SIR G. M.
GIFFARD, L. J., AUGUST 5, 1869.

[*Reported in Law Reports, 4 Chancery Appeals, 748.*]

THIS was an appeal from an order of the Vice-Chancellor MALINS, the question raised being as to the validity of bonds in the form called Lloyd's bonds, given by the Cork and Youghal Railway Company.

The Cork and Youghal Railway Company was incorporated by Act of Parliament, and empowered by several Acts to raise altogether £365,000 by shares, and to borrow altogether £131,000 upon mortgage or bond.

In April, 1861, the company had borrowed from David Leopold Lewis, who was called the financial agent of the company, sums of money amounting to £25,534, which had been received by the company and applied by them partly in payment to contractors, partly in payment for rolling stock and other goods, partly in payment of interest, partly in payment of the salaries of the officers of the company, and partly in payment for land. For the advances so made Lewis drew bills upon the company at short dates, which he from time to time procured to be discounted and again renewed by the company, charging a commission upon each renewal. The company afterwards borrowed further sums from Lewis, for which he drew bills in the same manner as before. In June, 1862, the whole of the share capital of the company (except £7435 which was soon afterwards raised) had been raised and spent; the company had issued mortgages for the whole of the £131,000 which they were empowered to raise; the advances made by Lewis to the company amounted to £101,149, and the railway was not completed.

In August, 1862, Lewis represented to the directors that he had great difficulties in renewing the company's bills, and that if the company would issue to him bonds in the form called Lloyd's bonds he would be able to raise money upon them with greater facility and would be able to supply the company with funds. At the half-yearly meeting of the company, held in August, 1862, a statement of accounts was read and adopted, showing

that the case of *Williams v. Paul*, 6 Bing. 653, "might perhaps be supported" on the ground "that though the contract was illegal, being made on a Sunday, the property in the goods passed, although no action could be maintained for them." His Lordship's argument was, that although the contract was void, as being made on a Sunday, yet as the property in the goods passed by delivery, the promise made on the following day to pay for them could not constitute any new consideration; and therefore he doubted whether the case of *Williams v. Paul* could be supported in law. *Reporters' note*, 5 M. and W. 702. — ED.

that the company had then spent £109,520 beyond the amount authorized to be raised by the Acts; and resolutions were passed to the effect that, as the company had obtained from Lewis large sums of money to pay for land, rolling stock, and the construction of the line, the directors were authorized to issue bonds to be given to Lewis as security for the debt due to him.

The directors accordingly issued and gave to Lewis bonds for various sums, amounting in the whole to £120,000, the bonds being in the following form:—

CORK AND YOUGHAL RAILWAY.

No. 156B.	Bond.	£1000.
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Know all men by these presents, that we, the Cork and Youghal Railway Company, are held and firmly bound unto David Leopold Lewis, of No. 11, George Yard, Lombard Street, London, Esq., in the sum of £1000, to be paid to the said David Leopold Lewis, his certain attorney, executors, administrators, or assigns, on the 20th day of August, 1865, with lawful interest thereon at 5 per cent per annum from the date hereof until payment, for which payment we hereby bind ourselves and our successors this 20th day of August, 1864.

Whereas the above-bounden company is justly and truly indebted to the above-named D. L. Lewis in the sum of £1000 for work done and goods and material supplied to the said company for the purposes of their undertaking, by the means and procurement and at the cost of the said D. L. Lewis, and at the request of the company, as they hereby acknowledge. And whereas the said D. L. Lewis hath applied to the said company for payment of the said sum of money, but hath, at the request of the said company, agreed to forbear payment of the same until the 20th day of August, 1865, on the said company becoming bound by this application for securing payment of the said principal sum on the day last aforesaid. Now, therefore, the condition of this obligation is, that if the said Cork and Youghal Railway Company, their successors or assigns, do and shall pay to the said D. L. Lewis, his executors, administrators, and assigns, the said sum of £1000 on or before the said 20th day of August, 1865, and do and shall pay interest thereon at the rate of £5 per cent per annum until payment, such interest to be paid half-yearly, the first payment to be made at the expiration of six calendar months from the date hereof, and for any fraction of a half-year to be paid on the day of payment of the said principal sum, then the above obligation to be void, otherwise to remain in full force and effect.

Given under the common seal of the said Company the
20th day of August, 1864.

Meetings of the directors were held from time to time, and at most of the meetings the further liabilities of the company were represented to the directors by the secretary, and resolutions were passed requesting Mr.

Lewis to provide for the same. The money appeared to have been required for different purposes connected with the railway, and in two instances at least Lewis was requested to find the money required for the payment of specific debts due from the company to contractors. Further bonds were delivered to Lewis, on account of the loans made by him, to the amount of £45,000, making a total of £165,000, and this was stated at a meeting of the shareholders held in February, 1863. From time to time when the bonds became due they were returned, and new bonds were issued in their place. Further sums were advanced by Lewis, and the same course of proceeding was followed until March, 1865, when Lewis became bankrupt. In the mean time Lewis had deposited bonds with different persons in order to raise money on them, and ultimately it appeared that he had so deposited bonds to the amount of £224,000, and himself held bonds to the amount of £145,000.

It appeared that the company always employed their own contractors, and that Lewis never entered into any contracts on behalf of the company, but that in two instances the specific sums advanced by him had been at once paid to creditors, and that in other instances he had advanced sums to meet specified debts.

By an Act, 29 & 30 Vict. c. exxiv., after reciting that the company might have incurred debts to a considerable amount beyond their mortgage debt, which they had not the means of paying, and that it would be of advantage to the public that the company's railway should be sold to the Great Southern and Western Railway Company, and that the company were desirous that their affairs should be wound up and they be dissolved, and that the purchasing company were willing to purchase the railway for a sum of £310,000 of the ordinary stock of the purchasing company, and that claims had been made on the selling company by persons who alleged that they were creditors of the company, the validity of whose claims was denied by the company, and it was expedient that provision be made for ascertaining whether and how far the claims against the company were valid or not, — it was enacted that, in consideration of £310,000 ordinary stock of the purchasing company, the undertaking, works, etc., of the selling company should be vested in the purchasing company, freed from all debts of the selling company. Provisions were then made for winding up the selling company, and for the appointment of an official liquidator, who should administer the £310,000 stock. And it was enacted by sect. 12, that "the net proceeds of the sale of the stock shall be applied, with the sanction of the court, by the official liquidator as follows; that is to say: —

"First. In payment of the costs of this Act by this Act provided to be paid by the company.

"Secondly. In payment of the compensation and expenses for completing, whether in the name of the company or in the name of the purchasing company, the purchases of lands taken by the company, and of all

sums which may be found due from the company with relation to lands for the taking of which notice has been given by the company.

"Thirdly. In payment of the principal and interest lawfully due on the mortgages of the company lawfully created under the powers of the company's Acts, and according to their respective rights and priorities as existing on the 1st day of January, 1866.

"Fourthly. In payment of the costs, charges, and expenses incurred by the company after the 15th day of March, 1865, in and about actions and suits and legal proceedings against them, and the negotiations between them and the purchasing company with respect to the arrangement effected by this Act, and also in payment of the necessary office expenses, salaries, and wages due at the time of such payment.

"Fifthly. The surplus shall be subject to all the rights, equities, priorities, claims, and demands, whether of preference or ordinary shareholders, bondholders, or others, to which the property would, in case this Act had not been passed, have been subject, and shall be applied accordingly."

The sale to the Great Southern and Western Railway Company was completed, and the £310,000 stock was transferred to the official liquidator, of which, after the payments directed by the first four clauses of the 12th section of the Act, £150,000 remained.

The official liquidator of Overend, Gurney, & Co., Limited, claimed the benefit of this surplus in respect of bonds for £191,000 held by that company, and the official liquidator of the London, Hamburg, and Continental Exchange Bank, Limited, claimed in respect of bonds for £40,000. Vice-Chancellor MALINS, before whom the applications came, made a declaration that so much of the moneys advanced by D. L. Lewis as was secured by Lloyd's bonds and applied for the benefit of the Cork and Youghal Railway Company, constituted a debt in equity, and was payable out of the assets of the company before any of the shareholders took any part of the surplus; and his Honor directed an inquiry how much (if any) of the money purported to have been advanced by Lewis, and to be secured by the bonds, was applied for the benefit of the company: and directed the costs of all parties to be taxed and paid by the official liquidator of the railway company.

Mr. H. R. Pick, a first-class preference shareholder in the railway company (who had liberty to attend on behalf of himself and other preference shareholders) appealed.

Mr. Jessel, Q. C., and Mr. Higgins, for the appellant.

Mr. Jackson, for a judgment-creditor.

Mr. Roeburgh, Q. C., and Mr. Lindley, for Overend, Gurney, & Co.

Mr. Cotton, Q. C., and Mr. Graham Hastings, for the London, Hamburg, &c. Bank.

Mr. Pearson, Q. C., and Mr. Waller, for the official liquidator of the

Lord HATHERLEY, L. C. It appears to the Lord Justice and myself that the order, as it now stands, is not exactly the order which the exigencies of the case require, but that, on the other hand, it would be most improper to hold that under and by virtue of the 12th section of the Act by which this company has been put an end to, and has been, in effect, bought by another company, the money should be distributed to the shareholders without making any provision whatever in respect of the payments that have been made by moneys procured from Mr. Lewis. The transaction was, no doubt, of an irregular character. The company having expended the whole of its capital, and reached the extent of its borrowing powers, found itself heavily embarrassed with debts, many of which appear to have been legally payable, being due to contractors and others for rolling stock and so forth, and these debts the company had not the means of paying. A contention has been raised by Mr. *Jessel*, against which it may not be necessary to decide on the present occasion, but it is one which, I conceive, would not be sustainable. He contends that when a railway company is formed with a certain amount of capital, and is authorized to execute certain works, then, unless the works can be executed with exactly the prescribed amount of capital, no further work can be done at all; in other words, that no contractor who has entered into an engagement to make the two or three miles of line required for the purpose of completing the work, would be able to recover in respect of the money, labor, and work expended by him on the company's behalf. That, I apprehend, would not be law, and the very point did arise in the case of *White v. Carmarthen Railway Company*,¹ which, as far as I recollect, was not appealed from. There a contractor was willing to give his services, and to take his chance of being paid, with such remedies as he could insist upon by bringing an action against the company and recovering judgment. In that case I held that the company were authorized in giving him a bond acknowledging the amount of the debt. On the other hand, it is equally clear, or it has been made clear if it was not clear before, by the case of *Chambers v. Manchester and Milford Railway Company*,² and the very able and lucid judgments there given, that where a company is authorized only to raise a given amount of capital by shares, and a certain other sum by debentures or mortgages, then the company cannot issue any debenture or loan-note, or any security of that description, for the mere purpose of raising money, and I apprehend that any such instrument so issued would be just as void in equity as at law, being contrary altogether to and absolutely forbidden by statute. And I entirely adopt the view which was taken by the learned judges in that case, that everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever. Accordingly they held that the bonds in that case, called *Lloyd's bonds*, were not, in effect, issued in respect of debts

¹ 1 H. & M. 786.² 5 B. & S. 588.

actually due, but were simply issued for the purpose of raising money, and were instruments to which no legal validity could be attributed; nor, as I apprehend, could any validity be given to them in this court any more than in a court of law. The learned judges there proceeded upon this ground, that the Act 7 & 8 Vict. c. 85, whilst it preserved the rights of those who at that time had advanced money to railway companies on the security of loan-notes or other instruments, proceeded to enact that from and after the passing of that Act, any railway company issuing any loan-note, or other negotiable or assignable instrument purporting to bind the company, as a legal security for money advanced to the railway company otherwise than under the provisions of some Act or Acts of Parliament authorizing the railway company to raise such money and to issue such security, should for that offence forfeit a certain sum of money. The judges held that the penalty imposed by that Act indicated plainly that the course of procedure in respect of which the penalty was imposed was forbidden by law, and that therefore no recovery could be had upon any such instrument in a court of law. Of course I need hardly say that if a thing be forbidden expressly by Act of Parliament, that Act can no more be contravened by this court than by any other court of judicature in the kingdom.

In that case a distinction is drawn by Mr. Justice BLACKBURN which appears to me to be very plain and clear. He says¹ that these instruments "are on their face the acknowledgment of a debt to some particular person, with a covenant to pay it. Such instrument may be useful in this way, — when a company are indebted it may be convenient to make a bond pointing to a particular portion of the debt actually due; it would facilitate the assignment in equity of the debt thus acknowledged to be due, and possibly throw upon the company the onus of showing the non-existence of the debt; but if there be no debt existing, such an instrument cannot create one, nor put the assignee in a better position than the original obligee or covenantee, and the person holding it could not recover upon it if it were shown that it were given gratuitously, or was not authorized by statute."

That being the state of the law, we have to consider the circumstances of this particular case. It is shown, I think, that as regards some of the moneys which have been raised through the medium of Mr. Lewis, some small portions were paid directly to persons who were actual creditors of the company, and so far, I apprehend, there could be little or no dispute as to the right of Mr. Lewis, or of a person claiming through him, to stand in the place of the original debtor, whose debt, being a valid debt, had been so paid.

But with regard to the other debts, they seem to stand in this position: As far as we can see, there were debts for which the company was liable; these debts having to be paid, and the shareholders, in truth, having full and distinct notice that there were these debts, and that there was a large

¹ 5 B. & S. 611.

sum to be provided for, the directors proceeded to issue the bonds in question, sanctioned, so far as it could be done, by the shareholders. I do not think that the direct and special sanction of the company, such as there would be at meetings, would have much to do with the matter, because it would rather depend upon the acquiescence of the company in the steps taken, and the benefit which they derived from the money raised, than upon any direct sanction which they could give to that which was otherwise beyond the powers of the directors.

It appears that Lewis found the money from time to time for the company, first of all by means of bills, and then by these bonds. He stated that he should find greater facilities in raising money by way of bonds, and he was accordingly furnished with these instruments, acknowledging that money was due to him for work and labor done, and with them he raised money. The money, it is said, was applied first of all in paying off bills, and not directly in paying off the particular debts due to Lewis, but the bills which had been given in respect of debts, or some of them. Then other bonds appear to have been given to pay off those bonds which had been so applied in paying off the bills, until, ultimately, we reach the set of bonds which are in the hands of the present holders.

Then comes the question, whether the present holders can be said to be entitled, under any circumstances, to claim payment upon these bonds. Now, first, it was said by Mr. *Jessel* that, taking these bonds at the best as a *chose in action*, even taking them to be that which they really are, a mere acknowledgment of a debt due apparently on a legitimate ground, those who took them must be exactly in the same condition as Mr. Lewis, the original holder, was in; and, therefore, if Mr. Lewis, the original holder, could not recover, on account of the position in which he was placed, with a full knowledge of all the circumstances, and of the manner in which the company had proceeded for the purpose of raising money, then no more could the holders of these *choses in action* be able to recover, nor could they be entitled to place themselves in a better position than he was in. That would be so if as between Mr. Lewis and the company, there were really no debt at all, or that this was all a mere sham, and that the directors had not in any way borrowed the money, or authorized the borrowing of the money, and had not been in any way parties to the transaction, or that the company had been in no way parties to the transaction. But if the money was really applied for the legitimate benefit of the company, can it be possible that the company can hold this money as a surplus which is directed to be paid to them under the Act, and treat these bonds as constituting no debt whatever by which they are in any way to be affected? They knew that there was a large sum of money which must be raised by some means, and for which the borrowing powers and subscription powers were not adequate; and although the bonds themselves may not be the proper instruments or mode by which that money ought to be raised,

still they are instruments issued for the express purpose of inducing others to give faith and credit to Mr. Lewis, as being a person to whom money was owing for the legitimate purposes of the company. And the money having been *de facto* so applied to the legitimate purposes of the company, is it possible that the company should be allowed to derive the benefit of all the expenditure which has been thus incurred, and claim the surplus for the benefit of the shareholders? Can the shareholders be allowed to say to the bondholders, "It is true that the debts have been cleared off by means of your money; but you are not the persons who have cleared them off, and you are not to receive the benefit of it, for we are the persons to receive the benefit"? The proper course to be taken seems to me to be this: that so far as the company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off. It is not simply that the bondholders stand as assignees of the debts, which no doubt have not actually been assigned, but it has been represented by the directors that the persons who lent their money on these acknowledgments were lending their money for the purpose of clearing off the debts; in fact, that they were to be put in the position of assignees of the debts.

Therefore, what we propose to do is to make this order: Let the order of the VICE-CHANCELLOR be varied, and declare that the receipt and expenditure by the directors of the company, in payment of any sums recoverable from the company of moneys advanced on or procured by means of the deposit of the alleged bonds, was *pro tanto* an adoption by the company of the transactions; and having regard to the representations contained in the alleged bonds, the moneys so expended constituted debts owing from the company. Inquire whether the company had the benefit of any, and what, expenditure in payment of any sums recoverable from the company of any and what sums advanced on or procured by means of any and which of the deposits of the alleged bonds, and whether any and which of the sums so expended still remain unpaid by the company. The costs to be as in the original order. No costs of this application, except that the official liquidator will take his costs out of the estate.

Sir G. M. GIFFARD, L. J. I think it of importance to state clearly in this case that it is not intended by the court to throw the slightest doubt on the decision come to in the case of *Chambers v. Manchester & Milford Railway Company*;¹ and from the course which the matter took in the court below, I think it is also important to say that there is no ground whatever for the argument that a contract or instrument which fails in a court of law by reason of its illegality can nevertheless be

¹ 5 B. & S. 588.

enforced in equity because money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a court of equity as it is in a court of law; and it is for that reason, among others, that the declaration made by the court below has been varied.

Now, as regards the present case, I am of opinion that the evidence was quite sufficient to throw on the company the onus of proof that there was fraud; but there has been no attempt to give evidence of fraud.

That being so, what the case amounts to is this: documents were given under the seal of the company. Those documents represented that the company was indebted to Mr. David Leopold Lewis in the amount there stated; they were given for the purpose of being deposited by him as security for advances to be made; and if the representations in them had been true, those who advanced their money on the deposit would have been assignees of the debts actually owing from the company to Lewis, and the transaction would have been perfectly legal.

Now, in this case the representations in the alleged bonds are either true or false, or partly true and partly false. In so far as they are true, the transactions are legitimate; for Mr. Lewis could assign his debt or debts. On the other hand, in so far as they are false, there was fraud on the part of the directors of the company. The representations on the face of the alleged bonds purported to be representations by the company, and induced the loans, and were made in order that the loans might be obtained. In so far, therefore, as the company has had the benefit of those loans for its legitimate purposes, it must be taken to have adopted the transaction. It cannot be heard to say the contrary, and to that extent must be held liable. For these reasons I concur in the order which the LORD CHANCELLOR has read.

Mr. *Jessel* applied for his costs of the appeal, as his client represented a class, and had been selected in order to obtain a decision, which was absolutely necessary for the administration of the estate.

Their Lordships refused to give the costs, as the appeal had only succeeded in part.

In re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY.
Ex parte WILLIAMSON.

IN CHANCERY, BEFORE SIR G. M. GIFFARD, L. J., DECEMBER 17, 1869.

[*Reported in Law Reports, 5 Chancery Appeals, 309.*]

THIS was a motion made by special leave of the Court of Appeal to discharge an order of the Master of the Rolls, whereby the National Permanent Benefit Building Society was ordered to be wound up.

The company was formed under the Benefit Societies Act, 6 & 7 Will. 4, c. 32, and commenced business in February, 1865.

The principal object of the company, as stated in the affidavit of Mr. W. Richardson, the secretary, was to provide a safe mode of investment for the funds of another society, called the National Savings Bank Association.

The rules contained the usual provisions for advancing money to members who held shares, and also contained powers of investing money in the hands of the directors; but there was no power to borrow money.

The prospectus, which was issued after the rules had been certified, contained the following announcement: "The directors have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before the time for it regularly arrives, such members of course paying interest on the sums lent, until their turn arrives."

In September, 1865, the Building Society borrowed £400 from the Savings Bank Association, which was forthwith advanced by the directors of the Building Society to a member, on mortgage security; and the mortgage deed was deposited with the Savings Bank, and the contributions of the member paid into the Savings Bank. In January, 1866, the Building Society borrowed a further sum of £900, which was applied in advances to members, and secured in like manner. Shortly afterwards the Savings Bank stopped payment, at which time they had advanced £1300 to the Building Society. The Savings Bank Association was subsequently ordered to be wound up.

On the 13th of July, 1867, the Master of the Rolls made an order to wind up the Building Society as an unregistered company under Part 8 of the Companies Act, 1862. The order was made on the petition of the official liquidator of the Savings Bank Association, who claimed to be a creditor for £1300 due to that association.

A proof for that sum was afterwards admitted against the estate of the Building Society, and an order for a call was made upon the contributories for payment of it. From this order J. W. Williamson and others, who had been settled on the list of contributories, appealed.

When the appeal was opened before the Lord Justice GIFFARD, it appeared that there was no debt due from the Building Society except the £1300 on which the winding-up petition was founded; and as the ground of the appeal was that this debt was invalid, the Lord Justice directed notice of motion to be given to discharge the winding-up order. This having been done, the two applications came on together.

The principal promoters of the Building Society were also promoters of the Savings Bank Association, and J. W. Williamson and some others of the appellants were directors or otherwise office-bearers in both companies.

Mr. *Roxburgh*, Q. C., and Mr. *Cottrell* for the appellants.

Sir *R. Baggalay*, Q. C., and Mr. *Higgins* for the official liquidator.

Sir G. M. GIFFARD, L. J. In point of form, this is an appeal from an order of the Master of the Rolls; but in reality, the point on which I am about to determine this case was never brought fairly or argued before him, and therefore the matter is very similar to an original hearing before me.

The case, when it is examined, is a perfectly simple one; but before I go into it I will dispose of what Sir *Richard Baggalay* said as to the parties who are making this application, and as to the delay. I quite agree that in many cases delay may be of very great importance, — especially if it has been shown that there have been sales of property or other dealings. I do not find in this case that anything of that description has taken place. Then, as regards parties, the nature of the case is such that I do not consider these parties personally disabled from bringing forward the case; more especially as they are not the only contributories on the list, — they being about nine out of a number of thirty-six. But although I think the winding-up order ought not to have been made, I certainly shall give them no costs.

The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent decision of the court in *Laing v. Reed*,¹ it was doubted whether, even if you put a limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But what we have here is a limited benefit building society without any power to borrow, and the rules and very nature of that society show that it would be contrary to its constitution to borrow money so as to bind the company, or to make the individual members of the company, as members, liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules, they are to receive certain loans.

After the rules had been certified and published, and the nature of the company had been fixed, a prospectus was issued; and by that prospectus

¹ L. R. 5 Ch. 4.

the directors chose to say "that they have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before their turn for it regularly arrives, such members of course paying interest on the sum lent until their turn arrives." If we look at the nature of the company, that can only amount to this: that the directors have chosen to pledge their personal liability. It is not a statement that the company were liable, or that any person who was a member of the company was at all bound or was personally made liable in respect of any debt of the company.

This being so, let us see on what ground this winding-up order was made. It was made upon the petition of a creditor, and in order to support that petition the petitioner must have made out that he was a creditor, either legal or equitable; either character would be sufficient. I have already said that this benefit building society could not incur a debt by borrowing money upon loan. Indeed, the contrary has hardly been argued. It could not do so any more than a mining company or any other of the companies which have not authority or power to bind their members by borrowing money. There was no legal debt; and if no legal debt, the next thing to inquire is, whether there was an equitable debt. A class of cases has been referred to on that subject, the principal of which are *In re German Mining Company*¹ and *In re Cork & Youghal Railway Company*,² the latter of which was before the LORD CHANCELLOR and myself a short time ago; I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle recognized in old cases, beginning with *Marlow v. Pittfield*,³ where there was a loan to an infant, and the money was spent in paying for necessities; and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from.

Then it is said that the present case is brought within that principle. I do not think it necessary to go through the evidence. Suffice it to say that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company. In truth, all this money went for the purpose of loans to members of this company. It is not for me to say whether the Savings Bank Association that lent the money have or have not any right, either as against the property of this company, which was pledged to them, or as against the persons

¹ 4 D. M. & G. 19.² L. R. 4 Ch. 748.³ 1 P. Wms. 558.

to whom this money was lent. If they have any such rights, they can only be asserted by filing a bill and taking a very different proceeding from that which has been taken here.

I am therefore of opinion that there is no legal or equitable debt. The winding-up petition is in the nature of an execution against the company. Whether the parties may or may not themselves be personally liable, or however much I may disapprove of their conduct, they are not to be precluded from showing that the title of the creditor to sustain a winding-up petition totally fails, as it does in this case. The consequence is that the winding-up order, the proof of the debt, and the order for the call must all be discharged. But, as I said before, the conduct of these parties has been such as to disentitle them to any costs.

BARONESS WENLOCK AND OTHERS v. THE RIVER DEE COMPANY.

IN THE COURT OF APPEAL, MAY 27, 1887.

[*Reported in Law Reports, 19 Queen's Bench Division, 155.*]

APPLICATION to vary the report of a special referee.

The facts were as follows :—

An action had been brought by the plaintiffs, as executors of the late Lord Wenlock, deceased, to recover from the defendants the amount of moneys advanced by the testator to them. The defence set up was in substance that the moneys had been borrowed by the company *ultra vires*. It appeared that the testator had advanced large sums of money to the defendant company. He had also paid off a previous advance of 56,000*l.* from the Rock Insurance Company to the defendants, taking an assignment of that debt and a fresh covenant for repayment to himself by the defendants. The judge at the trial gave judgment for the plaintiffs for the full amount of the advances by the testator to the defendants. Upon appeal the Court of Appeal varied his judgment, and, by order dated May 9, 1883, ordered that judgment should be entered for the plaintiffs for the amount of 25,000*l.* (that sum being the full amount which the company had power to borrow) and interest, and also that in addition thereto the plaintiffs should recover judgment for so much and so much only of the sums advanced as was employed in payment of any debts or liabilities of the company properly payable by them, and interest from the respective dates of such employment, and that it should be referred to a special referee to inquire as to and report the amount of the interest payable on the said sum of 25,000*l.* as aforesaid, and the amount of the parts of the said sums so employed as aforesaid and the interest thereon. On appeal to the House of Lords they affirmed the

decision of the Court of Appeal.¹ The special referee held an inquiry under the above order, upon which inquiry counsel were heard and witnesses examined, and he thereupon made a report. The plaintiffs now applied to the Court of Appeal to decide certain questions of law raised by such report, and to vary the report in certain respects, and there was a cross application to vary such report by the defendants. Various questions arose on the report with regard to items allowed or disallowed by the referee, which the plaintiffs claimed to have allowed under the order of May 9, 1883, but which the defendants contended should be disallowed.

The questions raised were briefly as follows : —

In addition to the portions of the moneys advanced which had been applied to the payment of debts or liabilities of the company existing at the time of the respective advances, the referee allowed, subject to the opinion of the court, items in respect of portions of the moneys advanced which had been applied in payment of debts and liabilities of the company which arose subsequently to the respective advances, whereas the defendants contended that he should have disallowed such items, and allowed only items in respect of moneys advanced which had been applied in payment of debts and liabilities existing at the date of the advances.

Further questions also arose, as after mentioned : —

Certain debts and liabilities of the defendant company had been paid by their bankers. The sums so paid by the company's bankers were paid to them out of the sums advanced by the Rock Life Insurance Company or Lord Wenlock. The plaintiffs claimed to be allowed by the referee the amounts so paid, whether the debts or liabilities accrued before or after the advances by the bankers or those by the Rock Company or Lord Wenlock.

A portion of the sums advanced to the defendants by the Rock Company or by Lord Wenlock had been paid over by them to a Mr. Green, who was a managing director and agent of the company, out of which he had made disbursements for the company in the course of their business, *e. g.*, for wages, work done, etc., some of such disbursements being in respect of debts incurred before, and some in respect of debts incurred after the receipt of the money by Green. The plaintiffs also claimed under the order of May 9, 1883, to be allowed the amount of the sums so disbursed.

The plaintiffs further claimed to be entitled to be allowed under the order, in addition to the 25,000*l.* for which they had judgment as being validly borrowed, the amount of all debts and liabilities of the company paid out of that sum of 25,000*l.*²

Repley, Q. C. and *R. O. B. Lane*, for the plaintiffs. The terms of the order of May 9, 1883, include all debts or liabilities of the company paid out of the advances of the plaintiffs' testator whether existing at the date of the advances or not. The doctrine of equity by which the lender or

¹ 40 App. Cas. 354.

² A portion of the case relating to a question of practice has been omitted. — Ed.

quasi-lender of money borrowed by a company *ultra vires* is subrogated to the rights of a creditor of the company whose debt has been paid off out of the money so borrowed, is not confined to cases where the debt was in existence at the time of the advance, but applies to all debts and liabilities of the company paid off out of the money so borrowed whether accruing before or after the advance. The principle upon which this equity depends is discussed in the case of *Blackburn Building Society v. Cunliffe, Brooks & Co.*,¹ and in the judgments in that case there is no trace of the limitation of the doctrine suggested by the defendants. If the company have had the benefit of the money so advanced by its application to debts or liabilities validly incurred by the company and which they were bound to meet, the person who has advanced the money is then subrogated to the rights of the creditors so paid off. The principle is that equity will follow the money, which remains in equity the property of the quasi-lender, and wherever it can find any security or piece of property representing the money the quasi-lender is entitled thereto: and therefore, so far as the money has been applied for the benefit of the company, it is to be treated in equity as existing in the coffers of the company, and must be repaid, not as money borrowed, but as money which still belongs in equity to the lender. The test is, whether the transaction has added to the liabilities of the company, and, so far as the advance has been applied to debts or liabilities which the company has validly incurred, whether before or after the advance, the company's liability is not increased.

The same principle applies to the cases where debts and liabilities of the company were paid by the company's bankers, and the bankers were paid or repaid the amounts so paid by them out of the moneys advanced by the plaintiffs' testator, whether such debts and liabilities accrued before or after the advances by the plaintiffs' testator or the advances by the bankers. The bankers would have an equitable right to be subrogated to the rights of the creditors so paid off, and such equitable right is a liability of the company which would come within the terms of the order of May 9, 1883, and the doctrine above alluded to. The same reasoning covers the sums paid to Green out of the advances by the plaintiffs' testator. These sums were applied to meet liabilities of the company, and the company's liabilities were not thereby increased; equity will follow the money into debts or liabilities of the company whether its application to such debts or liabilities is direct or through many hands and steps. It is further contended that by the express terms of the order of the 9th May the plaintiffs are entitled to any portion of the 25,000*l.* validly advanced which has been applied to the payment of debts and liabilities of the company, in addition to their judgment for the 25,000*l.* as money legally borrowed.

[They cited *In re Blackburn Benefit Building Society*; ² *Walton v. Edge*; ³

¹ 22 Ch. D. 61; also 9 App. Cas. 857, not on this point.

² 24 Ch. D. 421.

³ 10 App. Cas. 33.

Blackburn Benefit Building Society *v.* Cunliffe, Brooks & Co. ;¹ Knatchbull *v.* Hallett.²]

Sir *Horace Dargy*, Q. C. and *A. R. Kirby*, for the defendants. The order of May 9, 1883, must be construed with reference to what the court may consider to be the correct doctrine of equity as to subrogation in such cases. It is contended that the view of the doctrine on the subject contended for on behalf of the plaintiffs is far too wide and sweeping. The argument for the plaintiffs amounts to this: viz., that the rule which forbids borrowing money *ultra vires* is practically abrogated wherever it can be shown that money so borrowed was applied to the purposes of the corporation, that is to say, that as between the directors and the shareholders it was not misapplied. The doctrine of *Blackburn Benefit Society v. Cunliffe, Brooks & Co.*³ only applies to debts and liabilities existing at the time of the advance which have been satisfied out of it. So far as such debts and liabilities are concerned, it is clear that there has been no increase of the liability of the company. It is merely a substitution of one creditor for another. Altogether different considerations arise when the money borrowed is applied to payment of a liability subsequently incurred, and which might never have been incurred if the money had not been borrowed. The extension of the equitable doctrine now sought to be made would have the most dangerous effects, as enabling companies practically to borrow without limit.

[*LORD ESHER*, M. R. But even if the doctrine be limited to debts previously incurred, the company have only to postpone the borrowing until after they have incurred the liability.]

The true principle is, that there is supposed to have been an assignment of the debt paid out of the advance to the person making the advance; that the quasi-lender really pays his money to the creditor and takes an assignment from him of the debt; but that supposed assignment is only applicable to the case of debts in existence at the time of the advance. In the previous cases on the subject the question arose with regard to existing debts.

[They cited on this point *In re Cork and Youghal Ry. Co.*; ⁴ *In re German Mining Co.*⁵]

With regard to the other matters, viz., the moneys paid by the defendants' bankers in respect of debts of the company and repaid out of Lord Wenlock's advances and the moneys paid to Green, similar questions arise. It is contended with regard to these items that the equity relied upon by the plaintiffs is confined to sums directly applied by the company, or their agent, out of the moneys borrowed, in satisfaction of existing debts or liabilities of the company. An equity that the bankers might have in respect of sums advanced by them for the payment of debts or liabilities is not a debt or liability within the order of May 9, 1883. It is submitted, also, that the

¹ 29 Ch. D. 902.

² 13 Ch. D. 696.

³ 22 Ch. D. 61.

⁴ L. R. 1 Ch. 748.

⁵ 1 D. M. & G. 19.

equity be to subrogated to the rights of a creditor cannot be carried beyond persons to whom the money is directly paid in the first instance by the company or their agent; and that, unless such person is a creditor, the equity does not arise. Consequently the amounts disbursed by Green in respect of debts accruing after the receipt of the money by him must be disallowed, on the ground that, when the money was received by him, Green was not a creditor of the company in respect of these amounts. It would lead to endless inquiries and difficulties if the money had to be traced through several persons to see whether it ultimately was applied to the company's purposes.

It is clear that the plaintiffs' contention as to the debts paid out of the 25,000*l.* validly borrowed cannot be right, for the plaintiffs would be getting the same thing twice over if it were; and the terms of the order rightly construed exclude such contention. The money being validly borrowed was, when it got into the defendants' hands, the defendants' own money, and the equity to subrogation to the rights of the creditor cannot apply, for it depends on the doctrine that equity will treat the money borrowed as still remaining the quasi-lender's property, which only applies when the money is borrowed *ultra vires*.

Rigby, Q. C., in reply.

Cur. adv. vult.

The judgment of the court (Lord Esher, M. R., Fry and Lopes, L. J.J.,) was delivered by

Fry, L. J. The questions which now require determination in this case arise from the application of the order of this court of May 9, 1883, to the facts as found by Mr. Robertson, the special referee named in the order.

By that order it was directed that judgment should be entered for 25,000*l.* and interest, and in addition thereto for so much and so much only of the sums advanced to the defendant company by the Rock Life Assurance Company and Baron Wenlock as was employed in the payment of any debts or liabilities of the defendant company properly payable by them, with interest from the respective dates of such employment. It appears that some of the moneys were applied in payment of debts and liabilities properly payable by the company at the date of the advances, and some in payment of debts and liabilities which arose or became properly payable at dates subsequent to the advances. The defendants contend that only the advances employed in payment of debts and liabilities actually payable at the date of the advance can be brought within the operation of the direction in the order. The plaintiffs contend that all these advances are within the direction, and that the date of the accrual of the liability is immaterial. We are of opinion that the plaintiffs' contention ought to prevail. We are not at liberty to travel beyond or review the declaration contained in the order of May 9, 1883, which is binding on us not only as a decision of this court but by reason of its affirmation by the House of Lords :

and in our opinion the order rightly bears the wider construction. It is silent as to any limit of time within which the liabilities are to accrue, or within which they are to be paid : and by fixing the respective dates of the employment of the sums as the periods of time from which interest is to run, it seems to indicate that the date of the employment and not of the advance is the material one. If the court had intended any such limitation of the inquiry as that now contended for by the defendants, we think that it would have found expression, if not in the formal order, at any rate in the oral judgments, but we can find no trace of it.

But we go further and say that in our judgment the equity in question knows of no such limitation as that suggested. This equity is based on a fiction, which like all legal fictions, has been invented with a view to the furtherance of justice. The court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the company, and a payment by the company to its creditors as out of its own moneys ; and assumes on the contrary that the quasi-lender and the creditor of the company met together, and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between the quasi-lender and the creditor was confined to the day and hour of the advance of the money to the company ; in the coffers of the company the money really advanced as a loan is still thought of by the court as the money of the quasi-lender ; and the court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties who have met and contracted together only in the imagination of the court. The true limit of the doctrine we conceive to be stated by Lord SELBORNE, L.C., in delivering the judgment of this court in the case of the Blackburn Building Society v. Culliffe, Brooks & Co.¹ “The test,” said he, “is, has the transaction really added to the liabilities of the company ? If the amount of the company’s liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people’s money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity : and, if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing.” Now the payment of *bona fide* liabilities arising or accruing subsequently

¹ 22 Ch. D. 61, at p. 71.

to the actual date of the advance has in no way really added to the liabilities of the company, and therefore in no way transgresses the boundaries of the doctrine as laid down by this court in the case to which we have referred. Sir *Horace Davey* forcibly warned us of the danger of the proposition which we have laid down, and said that it would afford to companies a facile means of evading the limit of their borrowing powers. But the danger appears to us imaginary. We do not think that capitalists will be found knowingly and willingly to advance money in the hope of recovering it on the ground of some future subrogation to the future rights of some future creditor. The doctrine has rarely, if ever, done more for any one than snatch a few brands from the burning. In the present case the utmost extension of the doctrine will leave the plaintiffs heavy losers.

The next question arises in this way. Certain creditors of the company were paid by the bankers of the company; these bankers were paid by the advances of the Rock Company or Lord Wenlock: are the plaintiffs entitled to be subrogated to the rights of these creditors? It appears to us that they are entitled to be so subrogated; that the right of the bankers, which they obtained by subrogation from the creditors whom they paid, was an equitable liability of the company; and that for the purposes of this inquiry it is immaterial whether the rights of the creditors accrued before or after the advances by the bankers, or the Rock Company, or Lord Wenlock.

A similar question was discussed as to a Mr. Green, who was a managing director and agent of the company, and to whom payments were made by the company out of which he made disbursements for the company. It was argued that the inquiry must stop at the first payment by the company. But we can find no ground for this contention. To follow the money into a debt or liability of the company does not add to the liabilities of the company, whether that pursuit be through one or more hands and by one or many steps.

It is conceded that under the order of May 9, 1883, the plaintiffs are entitled to the 25,000*l.* and to so much of the sums advanced beyond the 25,000*l.* as was expended in satisfaction of the debts and liabilities of the company. The plaintiffs contend that they are entitled, in addition to all this, to so much of the 25,000*l.* itself as was so expended. They contend that this is given to them by the express terms of the order, and that the point, therefore, is not open to further consideration. We do not so read the order; for it appears to us that the 25,000*l.* is dealt with separately, in the first place, and that the rest of the order deals with sums in every respect outside of and beyond the 25,000*l.* The words in the order "in addition" exclude, in our opinion, all further consideration both of the borrowing of the 25,000*l.* and of its application. And in our opinion this is right in point of reason and principle: for the 25,000*l.*, having been validly borrowed, became part of the moneys of the company as much as the original

subscriptions of the members or the produce of sales of its lands ; and no application by the company of its own moneys to the payment of its own debts can be conceived of as a transaction between a quasi-lender to the company and the creditors of the company, or lead to a subrogation of the creditors' rights to the stranger. If the plaintiffs were to be subrogated to the rights of those creditors who were paid with the 25,000*l.*, we do not see why they should not be subrogated to the rights of every creditor paid by the company with its own moneys from any source whatever.

The matter must be referred back to the referee with the following declarations, and the costs of the hearing, which has led to partial success and failure on each side, must be costs in the cause. [Then followed formal declarations as to the mode of taking the account under the order of May 9, 1883, in accordance with the principles laid down by the judgment of the court. The substance of such declarations, so far as material to this report, was that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company which had been paid out of the sums advanced by the Rock Insurance Company or by Lord Wenlock, whether such debts and liabilities existed at the time of or accrued subsequently to the dates of the respective advances ; that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company which, having been paid by Messrs. Herries & Co. (the defendants' bankers) or others, had been paid or ultimately repaid to them out of any sums advanced by the Rock Insurance Company or by Lord Wenlock, whether such debts or liabilities existed at the time of or accrued subsequently to the dates of the respective advances by the Rock Insurance Company or Lord Wenlock, or the dates of the payments by Messrs. Herries & Co. or others ; that the plaintiffs were entitled to credit in respect of all debts and liabilities of the company paid by Green out of moneys paid to him by the company, whether such debts or liabilities existed at the time of or accrued subsequently to the receipt by him of the moneys out of which he paid them ; and that the plaintiffs were not entitled to be allowed anything in respect of debts or liabilities of the defendants paid out of the 25,000*l.* validly borrowed.]

Judgment accordingly.

TRACY v. TALMAGE, PRESIDENT, ETC.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 1856.

[*Reported in 14 New York Reports, 162.*]

THE North American Trust and Banking Company was, in July, 1838, organized in the city of New York as a corporation, under and by virtue of the act "To authorize the business of banking."¹ By the articles of asso-

¹ Laws of 1838, 245.

ciation the capital was \$2,000,000, with power to increase the same to \$50,000,000. The amount of the capital was subscribed, a small portion thereof paid in in cash, and the residue secured by bonds and mortgages and stocks.

In August, 1838, the company purchased \$1,000,000 of Arkansas bonds, paying therefor \$300,000 in cash, and issuing certificates of deposit for \$700,000, the residue of the price payable monthly, during some fifteen months. Of these bonds \$200,000 were deposited with the comptroller of the State as security for bank notes issued to the company, and the residue were sent to Europe, and sold on behalf of the company to meet drafts which it had drawn on its correspondents in London. About the 15th of September, 1838, the company commenced receiving deposits and discounting commercial paper. The company never received from the comptroller bank notes to exceed \$330,000. In January, 1839, the Trust and Banking Company purchased of the Morris Canal and Banking Company, a corporation created by the laws of the State of New Jersey, but which had an office and did business in the city of New York, bonds, made by the State of Indiana, to the amount of \$1,200,000, at par, and gave therefor, to the Morris Canal and Banking Company, its obligations, in the form of negotiable certificates of deposit, payable with interest at a future day. The most of these bonds were sent to the correspondents of the Trust and Banking Company, in London, and there sold at a discount to raise funds to meet the drafts of the company. In the fall of 1839 the Trust and Banking Company agreed to purchase, of the Morris Canal and Banking Company, bonds of the State of Indiana, amounting to \$1,000,000 at par, and to pay for the same, at 98 per cent, in negotiable certificates of deposit, made by the Trust and Banking Company, payable at a future day. This agreement was not in writing. On or about the 28th of October, 1839, these bonds were delivered by the Morris Canal and Banking Company to the Trust and Banking Company, and the latter made and delivered to the former certificates of deposit for the amount of the purchase price. The most of these certificates were for \$1000 each. They respectively bore date October 28, 1839, were signed by the president and cashier of the North American Trust and Banking Company, and stated that James Kay had deposited in the bank a sum, which was named, payable to his order, on the return of the certificate, on demand after a future day, which was specified; each certificate was indorsed by Kay in blank. These Indiana bonds were sent to London by the Trust and Banking Company to be sold to raise funds to meet its drafts and obligations payable there; and they were sold there at a large discount soon after the purchase. Kay, the payee named in and who indorsed the certificates, was a clerk for the Morris Canal and Banking Company; he never deposited any money with the Trust and Banking Company, and had no interest in the certificates. On the 11th of December, 1839, a written agreement was made between

the Morris Canal and Banking Company and the State of Indiana, which recited that the former was indebted to the latter for Indiana State stocks, theretofore sold and delivered by the latter to the former, and by which the Morris Canal and Banking Company agreed to deliver to the State of Indiana, among other securities, certificates of deposit in the North American Trust and Banking Company to the amount of \$196,000. Subsequently, and during the same month, the Canal and Banking Company transferred and delivered to the State of Indiana \$196,000 of the certificates issued to it by the Trust and Banking Company under date of October 28, 1839, and payable after January 1st, 1841, and the same were receipted by the State of Indiana on the back of the agreement last above mentioned. On the 2d of January, 1841, the State of Indiana surrendered to the Trust and Banking Company a portion of these certificates, to the amount of \$175,000, and received therefor eighteen other certificates of deposit, in the aggregate, for the same amount, dated on that day, signed by the president and cashier of the Trust and Banking Company, and payable to the order of, and indorsed by James Kay. Five of these certificates were for \$9000 each, and thirteen of them for \$10,000 each. Each stated that James Kay had deposited with the Trust and Banking Company a sum, which was specified, and that the company engaged to repay the holder of the certificate this sum upon the surrender thereof at a future day named, with interest at the rate of seven per cent per annum. Of these eighteen certificates, the one first due was payable five months from date, and one became payable every month thereafter. The purchases of the Indiana bonds were negotiated and consummated in the city of New York, and all the certificates were issued there.

In August, 1841, the plaintiff herein being a stockholder and creditor of the Trust and Banking Company, commenced this suit against it in the Court of Chancery. The bill was filed under the Revised Statutes,¹ and alleged that the company was insolvent, and that it had violated the law, etc. It prayed that the company might be enjoined from transacting business, that a receiver of its effects might be appointed and the corporation dissolved, etc. In September, thereafter, David Leavitt was appointed receiver, with the usual powers; and in June, 1843, a decree was made in the suit by which the Trust and Banking Company was adjudged to be insolvent, and it and its officers were perpetually enjoined, etc. An order was made in October, 1845, that the creditors of the company exhibit their claims to the receiver or be precluded from sharing in the funds, and providing that any claimant might enter his appearance in the action; and that if any claim were disallowed by the receiver, it should be referred to referees. Pursuant to this order the State of Indiana, in December, 1845, exhibited the claim in controversy to the receiver. In the notice of the claim furnished to the receiver it was stated that the State of Indiana had

¹ 2 R. S. 463, §§ 39-42.

a debt against the Trust and Banking Company of \$175,000, with interest thereon from the 2d of January, 1841, for a balance due at that date for bonds issued by said State, and sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company or otherwise. That this debt was owned by the State of Indiana, and that it should be allowed and paid to it, or that it should be allowed in the name of the Morris Canal and Banking Company for the use and benefit of the State of Indiana, and paid to the latter as the assignee of the demand. Attached to the notice of claim were the eighteen certificates for \$175,000, above mentioned, which it was alleged were issued by the Trust and Banking Company for the debt claimed. In March, 1846, the receiver disallowed the claim, and in March, 1847, an order was made referring it to three referees, who, after hearing the proofs, in September, 1850, reported against the validity of the claim. The report of the referees contained all the evidence given before them; and stated that they were of opinion, upon the proofs, that the claim was not valid, and that there was nothing due from the Trust and Banking Company or its receiver to the claimant. Other than this the particular conclusions of the referees as to the facts or law did not appear. The evidence proved the facts above stated. It also proved that the Indiana bonds were purchased by the Trust and Banking Company with the intention of selling them to raise money, and that they were so sold, principally in England, at a large discount. There was some evidence tending to prove that the Morris Canal and Banking Company knew at the time of the sale that the Trust and Banking Company purchased the bonds with this intention. It also appeared that the Trust and Banking Company, both before and after the purchase of the \$1,000,000 of bonds in October, 1849, was accustomed to make and issue negotiable certificates of deposit, payable on time; and that during the time it carried on business, it issued negotiable paper, payable at a future day, to over \$15,000,000. All the certificates issued on account of the Indiana bonds, except those in question, appeared to have been paid. There was evidence tending to prove that in making the sale of the bonds, the Morris Canal and Banking Company was in fact the agent of the State of Indiana. The State of Indiana filed exceptions to the report of the referees, which, in September, 1851, were overruled at a special term of the Supreme Court held in New York by Justice EDMONDS, and the report made by the referees affirmed. An appeal was taken by the State of Indiana, and in 1854, the court, at a general term held in New York, reversed the judgment rendered at special term, and adjudged that the claim was lawful and valid against the Trust and Banking Company, and was justly due and owing to the claimant, with interest from Jan. 2, 1841, "as the balance remaining unpaid for State bonds sold and delivered to the Trust and Banking Company by the Morris Canal and Banking Company, and by the last-mentioned company transferred to the claimant." The decree fixed and adjudged the

amount of the demand to be \$343,437.50, being the amount of the \$175,000 and interest from Jan. 2, 1841; and the receiver was directed to pay the same in the due administration of the assets of the company. From this decree the receiver appealed to this court.

The cause was argued in this court in 1855, and the court ordered a re-argument. It was again argued at the March term, 1856.

Samuel Boardley for the appellant.

A. Mann for the respondent.

SELDEN, J. To avoid confusion, I shall consider this case in the first instance as though the Morris Canal and Banking Company, instead of the State of Indiana, was the claimant upon the record. The general ground upon which the claim is resisted is, that it arises upon an illegal contract. Three grounds of illegality are alleged: 1. That the purchase of State stocks by the North American Trust and Banking Company for the purpose of resale, upon speculation, was beyond the scope of its corporate powers, and, therefore, illegal, and that the Morris Canal and Banking Company knew that such was the object of the purchase; 2. That the North American Trust and Banking Company had no power to issue negotiable promissory notes upon time; that such notes, therefore, and the contract of sale which provided for receiving them in payment, are illegal and void; 3. That the certificates or post notes delivered in payment for the State stock, being calculated and intended for circulation, were issued in violation of the restraining act; and that the Morris Canal and Banking Company was *particeps criminis*.

In examining the first of these grounds, I shall not notice the position taken by the counsel for the receiver, that a mere excess of authority on the part of a corporation in making a contract, is equivalent in its effect to the violation of a positive penal enactment; because, so far as the alleged illegality consists in the purpose for which the stocks were purchased, the case can, I think, be disposed of upon principles which do not involve that question. That the North American Trust and Banking Company made the purchase with a view to a resale, and not to a deposit with the controller, seems to be established by the proof; and that such a purchase and resale were unauthorized and beyond the scope of the corporate powers of the company, was settled by this court in the case of Talmage v. Pell.¹

It is contended by the counsel for the claimant, that there is no evidence that the vendors, the Morris Canal and Banking Company, had any knowledge of the object of the vendees in making the purchase. I shall, however, assume that they had such knowledge; because, in the view I take of the subject, it cannot affect the result. The question presented upon this branch of the case is, whether the bare knowledge by a vendor that the purchaser intends to make an unlawful use of the article sold, will prevent

¹ 3 Seld. 323.

a recovery for the purchase money.¹ Although I deem this question clear upon principle, I shall, nevertheless, rest my opinion in regard to it mainly upon the authorities.

A question somewhat analogous arose in the Court of King's Bench, in England, in the case of *Faikney v. Reynous*.² The plaintiff and one of the defendants had been jointly concerned in stock-jobbing; and the plaintiff, in contravention of an express statute, had advanced £3000, in compounding certain differences, for one-half of which the defendants had given the bond upon which the action was brought. Upon demurrer to a plea setting up these facts, the court held the plaintiff entitled to recover. Although that case differs from the one under consideration, in its facts, yet the principle upon which the case was decided, viz., that a party to a contract, innocent in itself, is not responsible for or affected by the use which the other may make of the subject of the contract, is equally applicable here. Lord MANSFIELD said, in speaking of the act of the defendant in giving the bond: "This is not prohibited. He is not concerned in the use which the other makes of the money; he may apply it as he thinks proper. But certainly this is a fair, honest transaction between these two."

There is a class of English cases which seems to me identical in principle with the present, and concerning which the decisions have been unvarying. I refer to the cases of goods purchased for the express purpose of being smuggled into England, in violation of the revenue laws, and where the object of the purchase was known to the vendor. The first of these cases is that of *Holman v. Johnson*,³ where the plaintiff, residing at Dunkirk, had sold to the defendant a quantity of tea, knowing that the latter intended to smuggle it into England, but had himself no concern in the smuggling. The action was brought for the price of the tea, and it was held, upon these facts, that the plaintiff could recover. The principle of the case is the same as that adopted in *Faikney v. Reynous*,² that mere knowledge by the vendor

¹ If one enters into a contract *for the purpose of* having the defendant use the subject-matter in a manner prohibited by statute, there can be no recovery. *Cannan v. Bryce*, 3 B. & Ald. 179; *McKinnell v. Robinson*, 3 M. & W. 434.

Mere knowledge that it is to be so used, though such use does not amount to a felony, will prevent a recovery. *Langton v. Hughes*, 1 M. & S. 592; *Pearce v. Brooks*, L. R. 1 Ex. 213 (*semble*).

Contra generally in the United States, see Pollock on Contracts, 2d Am. Ed. 323, note t.; 22 Alb. L. J. 405.

If the act prohibited amount to a felony, then mere knowledge will prevent a recovery. *Hanauer v. Doane*, 12 Wall. 342. See, however, *Tedder v. Odorn*, 2 Heisk. 68, *contra*.

Knowledge on the part of the plaintiff that the defendant intends to devote the subject-matter of the contract to an immoral use will prevent a recovery. *Pearce v. Brooks*, L. R. 1 Ex. 213. See, however, Pollock on Contracts, 2 Am. Ed. 323, note t.; 22 Alb. L. J. 405.

If the plaintiff does, or binds himself to do anything to facilitate the doing of the unlawful act, there can be no recovery. *Hull v. Ruggles*, 56 N. Y. 424; *Arnot v. Coal Co.*, 68 N. Y. 558. — ED.

² 4 Burr. 2069.

³ Cowp. 341.

of the unlawful intent did not make him a participator in the guilt of the purchaser. Lord MANSFIELD, who delivered the opinion in this case also, says: "The seller indeed knows what the buyer is going to do with the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods."

Where, however, the seller does any act which is calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as *particeps criminis*, and cannot recover; as is shown by the subsequent cases of *Biggs v. Lawrence*,¹ *Clugas v. Penaluna*,² and *Waymell v. Reed*.³ These were all cases where the plaintiff had sold goods to the defendant, knowing that they were to be smuggled into England; and in each of them the plaintiff was nonsuited. But they all differed from the case of *Holman v. Johnson* in this, that the plaintiff had in each case done some act, in addition to the sale, in aid and furtherance of the defendant's design to violate the revenue laws, and the decision was in each case placed distinctly upon this ground. The language of BULLER, J., in the case of *Waymell v. Reed*, is very explicit. He says: "In *Holman v. Johnson*, the seller did not assist the buyer in the smuggling. He merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose."

In each of the three cases last cited, special care is taken to guard against any inference that it was intended to impair the force of the decision in *Holman v. Johnson*. Indeed, that decision seems to have been uniformly followed by the courts of England from that day to the present. In 1835 the question again arose in the case of *Pellecat v. Angell*,⁴ and the court held that the plaintiff could recover the price of goods sold to the defendant, although he knew at the time of the sale that they were bought to be smuggled into England. Lord ABINGER says: "The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, there he must take the consequences of his own act." Again he says: "The plaintiff sold the goods; the defendant might smuggle them if he liked, or he might change his mind the next day; it does not at all import a contract, of which the smuggling was an essential part." It is true, the Chief Baron in one part of his opinion seems to lay some stress upon the fact that the plaintiff was a foreigner; but it is clear that this can have nothing to do with the principle upon which those cases rest, which is, that the act of selling is not in itself a violation of the law; and the mere fact of knowledge of the unlawful intent of the vendee does not make the vendor a participator in the guilt. The language of the associates of the Chief Baron goes to show that the domicile of the plaintiff

¹ 3 T. R. 454.² 4 T. R. 466.³ 5 T. R. 590.⁴ 2 C. M. & R. 311.

had no influence upon the decision. BOLLAND, B., says: "I think the distinction pointed out by the Lord Chief Baron, between merely knowing of the illegal purpose, and being a party to it by some act, is the true one." ALDERSON, B., says: "If the plea disclosed circumstances from which it followed, that permitting the plaintiff to recover would be permitting him to receive the fruits of an illegal act, the argument for the defendant would be right; but that ground fails, because the mere sale to a party, although he may intend to commit an illegal act, is no breach of law." That the place of residence of the vendor has nothing to do with the question, and that the principle of the case of *Holman v. Johnson* is sound, is further shown by the case of *Hodgson v. Temple*,¹ decided by the Court of Common Pleas in England. There, as it would seem, all the parties resided in London. The plaintiffs, who were distillers, had sold spirituous liquors to the defendant with full knowledge that the latter intended to retail them, in express violation of the revenue laws. It was insisted, in defence to an action brought for the purchase-money of the liquors, that the plaintiffs were *particeps criminis*, and could not recover. But MANSFIELD, C. J., said: "This would be carrying the law much further than it has ever yet been carried. The merely selling goods knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that it is necessary that the vendor should be a sharer in the illegal transaction."

Opposed to this series of cases, holding one uniform language, and sanctioned by such names as MANSFIELD, BULLER, KENYON, ABINGER, and others, I know of but a single English case, viz., that of *Langton and others v. Hughes*.² By a statute of 42 Geo. III., brewers were prohibited from using anything but malt and hops in the brewing of beer. The plaintiffs, who were druggists, had sold to the defendants, who were brewers, certain drugs, knowing that they were to be used contrary to the statute. In the 51 Geo. III., another statute was passed prohibiting druggists from selling to brewers certain articles, and among them those sold to defendants. The sale in question was made before the latter statute, but the suit was brought afterwards. The court held that the plaintiff could not recover. It is difficult to ascertain from the opinions the precise ground upon which the court intended to rest its decision. The case was so clearly within the terms of the statute of 51 Geo. III., that the judges were evidently induced to resort to a somewhat strained construction of the previous statute, and even to an attempt to connect that with the statute passed after the sale, for the sake of sustaining the defence. LE BLANC, J., after stating the question, says: "That depends upon the provisions of 42 Geo. III., coupling them in their construction with those of 51 Geo. III." It is apparent, I think, upon a review of the whole case, that it was not very well considered, and that the decision was really produced by the reflex influence of

¹ 5 Taunt. 181.

² 1 M. & S. 593.

the latter statute. This case, therefore, which does not appear to have been followed either in England or in this country, and which is virtually overruled by the subsequent case of *Pelleat v. Angell*,¹ can have but little weight in opposition to the numerous authorities to which I have referred, going to establish the contrary principle.

There is another class of English cases which have been sometimes supposed to conflict with the doctrine advanced in *Falkney v. Reynous*² and *Holman v. Johnson*,³ but which, when the precise ground upon which they were decided is considered, will be found to support rather than to detract from the doctrine. That ground is this: that it was the express object of the plaintiffs in those cases, in selling the goods or lending the money, that they should be used for an unlawful purpose, and that such purpose entered into and formed a part of the contract of sale or loan. A brief reference to those cases will show that this is the principle upon which they rest. The first case of this class is that of *Lightfoot et al. v. Temant*.⁴ The action was upon a bond given for goods sold, and the defendant pleaded that the plaintiff sold the goods "in order that" they should be shipped to the East Indies without the license of the East India Company, in violation of an express statute. The issue upon this plea was found for the defendant, and a motion for judgment *non obstante veredicto* was denied. EYRE, C. J., argues, that the jury having found that the plaintiff sold the goods "in order that" they should be shipped, etc., it cannot be said that he had no interest in their future destination; that he may well have sold the goods for an enhanced price, relying exclusively upon the profits to be realized from the illicit trade for payment. He says: "It is a possible case, that a tradesman may wish to speculate in this contraband trade, and to do it by dividing the profits with some man of spirit and enterprise, but without capital. Such a man would stipulate that the goods which he sold should be put on board a ship under a foreign commission, and should be sent to Calcutta to be there sold. His share of the profits would be found in the price originally fixed on the goods, but his hopes of payment would rest entirely on the returns of this contraband trade." Again he says: "But the jury having found for the plea, the court cannot say that the plaintiff had nothing to do with the future destination of the goods; unless it was impossible to state a case in which they could have anything to do with it." The decision in this case clearly is based upon the fact, that the future use to be made of the goods entered into and formed a part of the contract of sale. There are two other English cases belonging to the same class. The first is that of *Caman v. Bryce*.⁵ The defendant had lent money to a firm, which afterwards became bankrupt, for the purpose of paying a balance due upon certain illegal stock-jobbing transactions, and which had been applied to that object. He having afterwards received

¹ 2 C. M. & R. 311.² 4 Burr. 2069.³ Cowp. 341.⁴ 1 B. & P. 551.⁵ 3 B. & A. 179.

money belonging to the bankrupts, the assignees brought their action to recover those moneys, and it was held that the defendant could not set off his demand for the money loaned. The other case is that of *McKinnell v. Robinson*,¹ which was an action of assumpsit for money lent. The defendant pleaded that the money was lent in a certain common gambling room, for the purpose of the defendant's illegally playing and gaming therewith; and on demurrer the plea was held good. In each of these cases it will be seen that the illegal use was the express object for which the money was lent; and this is relied upon by the court in both cases in giving their judgment. In the case of *Cannan v. Bryce*, ABBOTT, C. J., says: "It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object;" and in the case of *McKinnell v. Robinson*, Lord ABINGER, in stating the principle by which the case was governed, says: "This principle is, that the repayment of money lent for the express purpose of accomplishing an illegal object, cannot be enforced."

It is worthy of note that the three cases last referred to present the views respectively of the heads of the three principal English courts, viz., ABBOTT, chief justice of the king's bench, EYRE, chief justice of the common pleas, and ABINGER, chief baron of the exchequer; and their concurrence in resting their decisions upon the fact that the illegal object was in the contemplation of both parties, and formed a part of the original contract, goes strongly to confirm the doctrine of the cases of *Faikney v. Reynous*,² *Holman v. Johnson*,³ etc. Indeed the whole current of English authority goes to support those cases, with the single exception of *Langton et al. v. Hughes*.⁴ They have also frequently been referred to by the courts in this country as containing sound doctrine. *De Groot v. Van Duzer*;⁵ *Merchants' Bank v. Spalding*;⁶ *Armstrong v. Toler*.⁷ In the latter case, Chief Justice MARSHALL refers to the case of *Faikney v. Reynous* in the following terms: "The general proposition stated by Lord MANSFIELD, in *Faikney v. Reynous*, that if one person pay the debt of another at his request, an action may be sustained to recover the money, although the original contract was unlawful, goes far in deciding the question now before the court. That the person who paid the money knew it was paid in discharge of a debt not recoverable at law, has never been held to alter the case."

The principles established by this strong array of authorities are in entire accordance with the case of *Talmage v. Pell*,⁸ decided by this court. It was a part of the contract in that case, between the banking company and the commissioners of the State of Ohio, that the bonds should remain in the hands of the agent of the State, to be sold on account of the banking com-

¹ 3 M. & W. 434.

² 4 Burr. 2069.

³ Cowp. 341.

⁴ 1 M. & S. 593.

⁵ 17 Wend. 170.

⁶ 12 Barb. 302.

⁷ 11 Wheat. 258.

⁸ 3 Seld. 328.

pany; and this fact is referred to and relied upon by GARDINER, J., by whom the opinion of the court was delivered. He says: "I am, for the reasons suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise, or to purchase them for the purpose of selling, as a means of obtaining money to discharge existing liabilities; that as the object of the purchase in this case was known to both parties, and made a part of their contract, the debt for the purchase-money cannot be enforced by the vendors, and that the collateral securities must stand or fall with the principal agreement." The case contains no intimation whatever that the mere knowledge, by the agents of the State of Ohio, that the banking company purchased the bonds with a view to a resale, would have defeated a recovery. On the contrary, such an inference was carefully guarded against by the learned judge who delivered the opinion, as appears from the extract just given.

I consider it, therefore, as entirely settled by the authorities to which I have referred, that it is no defence to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose, provided it is not made a part of the contract that they shall be used for that purpose; and, provided also, that the vendor has done nothing in aid or furtherance of the unlawful design. If, in this case, the bank had had no right to purchase State stocks for any purpose, then the contract of sale would have been necessarily illegal, and the vendor would, perhaps, be precluded from all remedy for the purchase-money. But here the purchase and sale for a lawful object was a contract which each party had a perfect right to make. Suppose the banking company, although intending at the time of the purchase to use the stocks for trading purposes, had, the next day, abandoned this intention and deposited them with the comptroller; would this change of purpose reflect back upon the contract of purchase, if it was corrupt, and divest it of its illegal taint? This could hardly be pretended; and, if not, then the consequence of the doctrine contended for here would inevitably be, that the vendor of the stocks, without having participated in any illegal act, or even illegal intent, but having simply known of such an intent subsequently abandoned, would be punished with a total loss of the property sold, and that for the benefit of the party alone guilty, if guilt could be predicated of such a transaction.

I am not aware of any principle which could justify this. The law does not punish a wrongful intent, when nothing is done to carry that intent into effect; much less, bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not necessarily *per se* a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase-money.

It follows, from this, that the sale of the stocks would have created a valid and legal obligation on the part of the banking company to pay the purchase-money, but for the form of the security agreed to be taken in payment; and this brings me to the consideration of the second ground of defence, viz., that the North American Trust and Banking Company had no authority to issue negotiable promissory notes, payable at a future day; and, consequently, that the contract which provided for their issue and for receiving them in payment, was illegal and void.

In considering this branch of the case, I shall not examine at length the questions so ably argued at bar, in regard to the nature of corporations and the limitations of their powers, but shall assume it to have been established, for the purposes of this case, at least, that associations under the general banking law, even prior to the act of 1840,¹ had no power to issue negotiable notes upon time; placing this assumption, however, not upon the safety fund act of 1829,² but upon the general principle of law which limits corporations to the exercise of powers expressly given to them, or such as are necessarily incident thereto, and upon the statute confirmatory of that principle.³

It follows, that in issuing the certificates or post notes delivered to the Morris Canal and Banking Company in consideration of the stocks transferred, the North American Trust and Banking Company exceeded its corporate powers. That those certificates were negotiable promissory notes, is clear. *Bank of Orleans v. Merrill*; ⁴ *Leavitt v. Palmer*; ⁵ *Talmage v. Pell*.⁶ Does this act of the Trust and Banking Company, thus transcending its legitimate powers, so taint and corrupt the contract of sale as to deprive the vendors of the stocks of all remedy for the purchase-money? The counsel for the claimants sought upon the argument to maintain that the sale of the stocks and the receipt of the certificates were distinct transactions; and, hence, that the debt created by the sale would remain, notwithstanding the illegality of the securities. In this, however, he is not sustained, I think, by the evidence. The proof seems to be clear, that the agreement to receive the certificates or post notes was simultaneous with and formed a part of the contract of purchase. It becomes necessary, therefore, to meet the question, whether the consent and agreement of the vendors to receive the certificates in payment will prevent a recovery in any form for the stock sold.

It results, from what has been previously said, that there was nothing in the contract of sale, considered by itself, separately from the agreement in relation to the security, to impair the validity of the debt; but, on the contrary, that the sale of the stocks created as valid and meritorious a consideration for the obligation assumed by the Trust and Banking Company as if the money had actually been deposited according to the

¹ Laws of 1840, 306, § 4.

² Laws of 1829, 167.

³ 1 R. S. 600, § 3.

⁴ 2 Hill, 295.

⁵ 3 Const. 19.

⁶ 3 Seld. 323.

tenor of the certificates. The objection to the claim, therefore, rests upon the nature of the securities alone, and acquires no additional force from the want of power in the Trust and Banking Company to traffic in stocks.

It has long been settled that contracts founded upon an illegal consideration, or which contemplate the performance of that which is either *malum in se*, or prohibited by some positive statute, are void. But the application of this rule to contracts made by corporations, the sole objection to which consists in their being *ultra vires*, is comparatively modern. The doctrine rests mainly upon three recent English cases, viz., *East Anglian Railway Company v. Eastern Counties Railway Company*,¹ *McGregor v. The Official Manager of the Deal and Dover Railway Company*,² and the *Mayor of Norwich v. The Norfolk Railway Company*.³

That a contract by a corporation which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny; and this principle alone is abundantly sufficient to sustain the cases above cited, which were all actions founded upon and affirming the validity of the illegal contract. But it is quite another question, whether such a contract is so tainted with corruption, that the party dealing with the corporation will be refused all remedy in a suit proceeding upon the ground of a disaffirmance of the contract, and asking only such relief as equity demands. Whether a contract of this nature can fairly be brought, consistently with either reason or adjudged cases, within the range of the maxim, *ex turpi causa non oritur actio*, cannot be considered as settled by the cases referred to; especially, as in the last of those cases the court was equally divided, and it was only disposed of by one of the judges withdrawing his opinion with a view to an appeal.

Prior to the case of *East Anglian Railway Company v. Eastern Counties Railway Company*,¹ the rule which denied all relief, in equity as well as at law, to any party to an illegal contract, had been generally applied only to cases where the contract was either *malum in se* or specifically prohibited by statute. It was wholly unnecessary to the decision of that case to resort to any extension of that rule; because, to enforce a contract against a party, which that party was incompetent in law to make, would indeed be, in the language of some of the cases, "to make the law an instrument in its own subversion." The courts, however, in that as well as the two subsequent cases, do appear to have been inclined to hold that contracts of corporations, which are *ultra vires* merely, come within the general rule which denies all aid to either party to a contract made in violation of law. But it will not be necessary here to pass upon the correctness of this doctrine advanced in those cases, as, in the view I take of this case, it falls clearly within an exception to that rule; and, for the purposes of this question, I shall concede: 1. That the issuing and delivery by the North

¹ 7 Eng. L. & Eq. 595.

² 16 Eng. L. & Eq. 180.

³ 30 Eng. L. & Eq. 120.

American Trust and Banking Company of its promissory notes payable on time, was *ultra vires*; and that the effect of this upon the contract was the same as if it had been specifically prohibited under a penalty; and 2. That the notes issued were calculated and intended for circulation as money, and were, therefore, issued contrary to the inhibitions of the restraining act. These concessions are made for the purposes of this case only, and without intending definitely to decide the points conceded.

There are one or two classes of cases to which it will be necessary to refer in order to afford a clear view of the question here presented. The first consists in a series of cases in which a distinction has been taken between those illegal contracts where both parties are equally culpable, and those in which, although both have participated in the illegal act, the guilt rests chiefly upon one. The maxim, *ex dolo malo non oritur actio* is qualified by another, viz., *in pari delicto melior est conditio defendentis*. Unless, therefore, the parties are *in pari delicto* as well as *particeps criminis*, the courts, although the contract be illegal, will afford relief, where equity requires it, to the more innocent party.

It was insisted by the counsel for the receiver, upon the argument, that in no case would relief be afforded to any party to an illegal contract, unless he applied for such relief, or, at least, had elected to disaffirm the contract while it remained executory. This position cannot, I think, be sustained. It overlooks distinctions which are clearly settled. The cases in which the courts will give relief to one of the parties on the ground that he is not *in pari delicto*, form an independent class, entirely distinct from those cases which rest upon a disaffirmance of the contract before it is executed. It is essential to both classes that the contract be merely *malum prohibitum*. If *malum in se*, the courts will in no case interfere to relieve either party from any of its consequences.¹ But where the contract neither involves moral turpitude nor violates any general principle of public policy, and money or property has been advanced upon it, relief will be granted to the party making the advance: 1. Where he is not *in pari delicto*; or, 2. In some cases where he elects to disaffirm the contract while it remains executory. In cases belonging to the first of these classes, it is of no importance whether the contract has been executed or not;² and in those belonging to the second, it is equally unimportant that the parties are *in pari delicto*.³ This will clearly appear upon a brief review of some of the leading cases.

¹ *Tappenden v. Randall*, 2 B. & P. 467 (*semble*); *Spring Co. v. Knowlton*, 103 U. S. 49 (*semble*); *White v. Franklin Bank*, 22 Pick. 181 (*semble*) *accord.* — *En.*

² See *infra*, 504-522.

³ *Taylor v. Bowers*, 1 Q. B. Div. 291; *Spring Co. v. Knowlton*, 108 U. S. 49; *White v. Franklin Bank*, 22 Pick. 181 (*semble*) *accord.*; *Knowlton v. Spring Co.*, 57 N. Y. 518, *contra*.

Money in the hands of an agent which he holds under instructions to pay to one who

The first case which I deem it material to notice is that of *Smith v. Brounley*.¹ The plaintiff's brother having become bankrupt, and a commission having been taken out against him, the plaintiff advanced £40 to the defendant, who was the principal creditor, to induce him to sign the certificate. The action, which was brought to recover this money, was sustained. In reply to the argument that the plaintiff was seeking to recover back money paid upon an illegal contract, Lord MANSFIELD said: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action; for when both parties are equally criminal against such general laws, the rule is *potior est conditio defendantis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover; and it is astonishing that the reports do not distinguish between violations of the one sort and the other." Two things are to be noted in this extract. That a distinction is taken between contracts *malum prohibitum* merely, and such as are immoral or contrary to general principles of policy; and also that stress is laid upon the fact that the law contravened in this case was intended to protect one party from oppression by the other. The first is a valid distinction, which runs through all the subsequent cases; the last was merely incidental to the particular case, and not essential to the principle. The first cases in which the principle was applied, were naturally those where the statute violated was intended for the special protection of the party seeking relief from some undue advantage taken by the other, because those were the cases in which the injustice of applying the same rule to both parties would be the most glaring. But it soon came to be seen that the principle was equally applicable to cases where the law infringed was intended for the protection of the public in general.

The case of *Jaques v. Golightly*² was an action brought to recover back money paid for insuring lottery tickets. The defendant kept an office for insurance contrary to the statute 14 Geo. III., ch. 76. It was urged that the plaintiff being *particeps criminis*, and having knowingly transgressed a public law, was not entitled to relief; but the action was sustained by the unanimous opinion of the court. BLACKSTONE, J., said: "These lottery acts differ from the stock-jobbing act of 7 Geo. II., ch. 8, because there both parties are made criminal and subject to penalties." The rule here suggested for determining whether the parties are *in pari delicto*, seems reasonable and just. There are, undoubtedly, other cases in which the parties

¹ Considered services, relying on the principal's promise to pay a bribe therefor, can be recovered by the principal. *Bone v. Eckless*, 5 H. & N. 925.

² Money deposited with a stakeholder as a wager can be recovered before payment over. *Cotton v. Thurland*, 5 T. R. 405; *Love v. Harvey*, 114 Mass. 80. — ED.

¹ Dugel, 670, in note.

² 2 W. Bl. 1073.

are not equally guilty ; but it is safe to assume, that whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as *par delictum*. In *Browning v. Morris*,¹ Lord MANSFIELD, after referring with approbation to the case of *Jaques v. Golightly*, reiterates the argument of BLACKSTONE, J., in that case. He says : "And it is very material that the statute itself, by the distinction it makes, has marked the criminal, for the penalties are all on one side, — upon the office-keeper."

The question next arose in the case of *Jaques v. Withy*,² which is identical with the case of *Jaques v. Golightly*, decided by the same court fifteen years before. The action was brought to recover back money paid for insurance to the keeper of a lottery insurance office, and it was held to lie. It will be seen that these two cases are not like that of *Smith v. Bromley*, where an undue advantage was taken of the peculiar situation of the plaintiff ; and that although some effort is made in *Jaques v. Golightly*, and by Lord MANSFIELD in *Browning v. Morris*,¹ to bring them within the reasoning of that case, they are really placed upon the broad ground that the parties are not *in pari delicto*, and, as evidence of this, the court rely upon the fact that the penalty was imposed upon the defendant alone. A similar question came before the Court of King's Bench in the case of *Williams v. Hedley*,³ where the previous cases were ably and elaborately reviewed by Lord ELLENBOROUGH. The action was brought to recover back money which had been paid by the plaintiff to compromise a *qui tam* action pending against him for usury. The principle of the decision cannot be better stated than by transcribing the head-note of the reporter, which is this : "Money paid by A. to B., in order to compromise a *qui tam* action of usury brought by B. against A. on the ground of a usurious transaction between the latter and one E., may be recovered back in an action by A. for money had and received. For the prohibition and penalties of the statute of 18 Eliz. c. 5, attach only on the informer or plaintiff or other person suing out process in the penal action making composition, etc., contrary to the statute, and not upon the party paying the composition ; and, therefore, the latter does not stand, in this respect, *in pari delicto*, nor is he *particeps criminis* with such compounding informer or plaintiff."

These are the leading English cases on this subject ; and it is plain that they do not rest solely upon the ground that the statute infringed was intended to protect one party from acts of oppression or extortion by the other ; and equally plain that relief is granted in this class of cases entirely irrespective of the question whether the contract be executed or executory. It was, in fact, executed in all these cases.

The series of cases here referred to have never been overruled. On the contrary, they have been expressly sanctioned and approved in several American cases. In *Inhabitants of Worcester v. Eaton*,⁴ Chief Justice

¹ 2 Cowp. 790.² 1 H. Bl. 65.³ 8 East, 373.⁴ 11 Mass. 363.

PARKER, after referring to the cases of *Smith v. Bromley*¹ and *Browning v. Morris*,² and to the distinction there taken, says: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption as a principle of common law in this country." The case of *White v. Franklin Bank*,³ proceeds upon the same distinction. It is impossible, as it seems to me, to distinguish this case in principle from that now before the court. The Revised Statutes of Massachusetts⁴ prohibited banks from making any contract "for the payment of money at a future day certain," under a penalty of a forfeiture of their charter. The plaintiff had deposited money with the defendant in February, to remain until the 10th day of August; and the action was brought to recover this money. It was objected that the contract was illegal and the parties *particeps criminis*, but the defence was overruled. This is by no means an anomalous case, as the counsel for the receiver upon the argument of this case seemed to suppose. On the contrary, it belongs clearly to the same class with the English cases just reviewed. WILDE, J., who delivered the opinion of the court, after referring to those cases, and quoting the remarks of Chief Justice PARKER in *Inhabitants of Worcester v. Eaton*, given above, says: "The principle is in every respect applicable to the present case, and is decisive. The prohibition is particularly levelled against the bank, and not against any person dealing with the bank. In the words of Lord MANSFIELD, 'the statute itself, by the distinction it makes, has marked the criminal.' The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter."

Again, in the case of *Lowell v. Boston and Lowell Railroad Company*,⁵ where the objection was raised that the parties were *particeps criminis*, the same Justice says: "In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers." The same doctrine was reiterated in *Atlas Bank v. Nahant Bank*.⁶ The principle of these cases was also adopted by our own supreme court in the case *Mount v. Waite*.⁷ The action was to recover back money which the plaintiffs had paid to the defendants for insuring lottery tickets contrary to the policy of a statute passed in 1807. KENT, C. J., says: "The plaintiffs here committed no crime in making the contract. They violated no statute, nor was the contract *malum in se*. I think, therefore, the maxim as to parties *in pari delicto* does not apply, for the plaintiffs were not *in delicto*."

¹ DougL. 676, in note.² 2 Cowp. 790.³ 22 Pick. 181.⁴ Ch. 36, § 57.⁵ 23 P. L. 24.⁶ 3 Met. 581.⁷ 7 Johns. 434.

This case is the last of the class to which I shall refer ; and I think it would be difficult to find a series of cases, running through almost a century, more uniform and consistent in tone and principle and in the distinctions upon which they are based. They have never, so far as I am aware, been overruled ; and I know of no principle which would justify this court in disregarding them. The doctrine seems to me eminently reasonable and just, and I discover no principle of public policy to which it stands opposed. On the contrary, I concur in the sentiment which Judge WILDE, in *White v. Franklin Bank*, expresses, thus : "To decide that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank."

This language is as applicable to the case before us as to that in which it was used. It is said that all persons dealing with banks and other corporations are presumed to know the extent of their powers. This is no doubt technically true, and yet we cannot shut our eyes to the fact, that in very many cases it is a mere legal fiction. If we take the present case as an example, it is plain that it would not have been easy for the Morris Canal and Banking Company with the charter of the Trust and Banking Company and the restraining act both before them, to determine whether the issue of these certificates in payment for State stocks would violate either ; and yet, upon the doctrine here contended for, an honest mistake in this respect would visit upon the former company a forfeiture of the entire amount of stocks transferred, which the latter company, if disposed, might pocket. Such a principle would afford the strongest possible inducement for banks to transgress the law. All that they could get into their hands, by persuading others to take their unauthorized paper, would be theirs. Under such a rule, arguments to make it appear that they have power to do what they really have not, might be made to constitute the most available portion of their capital ; and unauthorized dealing in large amounts, with foreign states or corporations not familiar with our laws, the most profitable branch of their business. These considerations go, in my judgment, to strengthen and confirm the doctrine of the cases referred to, which hold that relief may be granted to the more innocent, when the parties are not *in pari delicto*.

The rule laid down in those cases for determining which is the more guilty party is directly applicable to the present case, so far as the transaction is held to fall within the provisions of the restraining act. It has been conceded, as was contended by the counsel for the receiver upon the argument, that the issuing of the certificates in this case was a violation

of §§ 3, 6, and 7 of the act concerning unauthorized banking.¹ It will be seen, by referring to those sections, that the penalties are imposed exclusively upon the corporation violating the provisions of the act, and upon its officers and members. So far, therefore, as the defence is based upon a violation of the restraining act, there is that statutory designation of the guilty party upon which most of the cases to which I have referred are made to rest. But it is obvious that the general principle for which I contend applies equally to that branch of the defence which rests upon the ground that the act of the banking company, in issuing the notes, was *ultra vires* and against public policy. The imposition of the penalties for a violation of the restraining law upon the corporation alone, does not make it the guilty party, but it is simply evidence that the legislature so regarded it; and the reasons are equally strong for fixing the principal guilt upon the same party where its acts merely violate the principle of public policy. Although persons dealing with corporations are, for certain purposes, presumed to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties. To me, therefore, it seems plain, that whether we regard the act of the Trust and Banking Company in issuing the certificates in question as a violation of the restraining law, or as simply *ultra vires*, or as against public policy, the corporation is to be regarded as comparatively the guilty party.

I wish here briefly to refer to another class of cases decided in this State, and known as the Utica Insurance cases, not as authority for my conclusion, but by way of illustrating the distinctions to which I have adverted. The first of these is *The Utica Insurance Company v. Scott*.² The action was upon a promissory note discounted by the insurance company in the ordinary way of discounting by a bank. It was held that the insurance company had no power to discount notes; and that in so doing it had violated the restraining act. But the court say: "In analogy to the statute against gaming, the notes and securities are absolutely void, into whatever hands they may pass; but there is a material distinction between the security and the contract of lending. The lending of money is not declared to be void, and, therefore, whenever money has been lent, it may be recovered, although the security itself is void." Judgment was, however, given for the defendant in that case, because the action was brought upon the note alone. The next case was that of *The Utica Insurance Company v. Kip*.³ This, also, was an action upon a note discounted by the insurance company; but the declaration also contained a count for money lent. The plaintiff recovered; and the court say: "The illegal contract, if any, was not the loan, for the plaintiffs had a right to loan the money to the defendants; but it was the agreement to secure the loan by a note discounted. Avoiding what was illegal does not avoid what was lawful. The action for money lent is rather a disaffirmance of the illegal contract." Similar

¹ 1 R. S. 712.

² 19 Johns. 1.

³ 8 Cow. 20.

decisions were made in three subsequent cases, viz.: The Utica Insurance Company v. Cadwell,¹ Same v. Kip,² and Same v. Bloodgood.³

These cases have never been overruled; and yet I think I may say, they have generally been regarded with some suspicion as to their soundness. In New Hope Company v. Poughkeepsie Silk Company,⁴ NELSON, J., in speaking of them, says: "Whether the doctrine of these cases is well founded and may be upheld upon established principles or not, or whether the result was not ultimately influenced by the peculiar phraseology and powers of the charter of The Utica Insurance Company, in respect to which they arose, it is not necessary at present to examine. I am free to say, in either aspect, I should have great difficulty in assenting to them." There is, undoubtedly, "great difficulty" in reconciling these cases with the settled rules in regard to illegal contracts; and the difficulty consists precisely in this, that the court, in the Utica Insurance cases, have given to the guilty party the benefit of a principle which is only applicable to the more innocent. In the first case in which the Insurance company recovered, viz., The Utica Insurance Company v. Kip, the court cite and rely upon the following passage from Comyn: "Where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that he should recover."⁵ Comyn cites as authority for this passage, the case of Jaques v. Withy,⁶ which is one of the cases to which I have referred, in which the plaintiff recovered on the ground that he was not *in pari delicto* with the defendant; and on turning to that case it will be seen that the passage is copied *verbatim* from the argument of Serjeant *Adair*, counsel for the plaintiff. It is thus made apparent that the doctrine of the Utica Insurance cases is built, in part, at least, upon the principles and arguments which lie at the foundation of the class of cases just passed in review. More can scarcely be needed to justify the doubt which has been cast upon these insurance cases. How principles, appropriately used to sustain a recovery against a party, upon the express ground that he is the party upon whom the prohibition and penalties of the law attach, can be made available to justify a recovery by a party so situated, is certainly difficult to comprehend.

But, notwithstanding the misapplication to these cases of the principles for which I contend, the cases themselves afford strong evidence of the appreciation, by the court, of the soundness of those principles. Indeed, few, as it seems to me, will be found to deny either the justice or policy of

¹ 3 Wend. 296.² 3 Wend. 369.³ 4 Wend. 652.⁴ 25 Wend. 648.⁵ 2 Com. Con. part 2, ch. 4, art. 20.⁶ 1 H. Bl. 65.

the rule which refuses to permit the guilty party to retain the fruits of an illegal transaction at the expense of the more innocent. But were it otherwise, the rule, as I have shown, is indisputably established; and that the present case falls within that rule is entirely clear. We have next, then, to ascertain the relief to which the Morris Canal and Banking Company would, if the claimant upon the record, be entitled.

The illegal contract itself is of course void, and no part of it can be enforced. It is impossible, I think, to sustain the reasoning adopted in the *Utica Insurance* cases; by which that part of the contract which embraces the loan (in this case, the sale) is separated from the portion relating to the security, and upheld as a distinct and valid contract. The contract there, as here, was entire; and it is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void. Recoveries are not had in such cases upon the basis of the express contract, which is tainted with illegality; but upon an implied contract, founded upon the moral obligation resting upon the defendant to account for the money or property received. The claim presented by the State of Indiana to the referees was in general terms, and broad enough to embrace a demand arising upon an implied contract to pay for the bonds transferred; and it has been repeatedly held that a corporation may become liable upon such a contract founded upon a moral obligation, like that existing in this case. *Bank of Columbia v. Patterson, Adm.*; ¹ *Danforth v. Schoharie Turnpike Company*; ² *Bank of U. S. v. Dandridge*.³

It follows, from these principles, that if the Morris Canal and Banking Company was the claimant upon the record, it would be entitled to recover, not the specific balance due upon the certificates, nor the price agreed to be paid for the stocks, but so much as the stocks transferred were reasonably worth at the time of such transfer, with interest, deducting therefrom whatever has been actually paid in any form by the North American Trust and Banking Company for the same, and leaving, however, the contract of sale, so far as it has been executed by payment, or its equivalent, undisturbed.

The only remaining question is, whether the State of Indiana has succeeded to the rights of the Morris Canal and Banking Company in this respect. If, as it seems to have been held by the Supreme Court both at special and general terms, the Canal and Banking Company acted in the sale of the stocks as the agent of the State of Indiana, then, of course, the latter, as the principal, is the proper party here. But aside from this, I cannot doubt that a court of equity would hold, upon the face of the transaction, that it was the intention of the Morris Canal and Banking Company to transfer to the State its entire claim against the Trust and Banking Company, growing out of the sale of the stocks, and would, if necessary, compel

¹ 7 Cranch, 299.

² 12 Johns. 227.

³ 12 Wheat. 64.

any formal defects in such transfer to be supplied; and as the proceeding here is of an equitable nature, the court, upon well settled principles, will regard what ought to be done as having been done.

The judgment of the Supreme Court should be modified in accordance with these principles, and the proceedings remitted.

A. S. JOHNSON, J., dissented.

Judgment modified.

THOMAS v. CITY OF RICHMOND.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1870.

[*Reported in 12 Wallace, 349.*]

ERROR to the Circuit Court for the District of Virginia, on a suit upon certain notes issued during the rebellion by the city corporation of Richmond; the case being thus:—

A statute Virginia passed in 1854, and reproduced in the code of 1860, thus enacts:—

“SECTION 15. All members of any association, or company that shall trade or deal as a bank or carry on banking without authority of law, and their officers and agents therein, shall be confined in jail not more than six months, and fined not less than \$100, nor more than \$500.

“SECTION 16. Every free person,¹ who with intent to create a circulating medium, shall issue, without authority of law, any note or other security, purporting that money or other thing of value is payable by, or on behalf of, such person, and every officer and agent of such person therein, shall be confined in jail,” etc.

“SECTION 17. If a free person pass or receive in payment any note or security, issued in violation of either of the two preceding sections, he shall be fined not less than \$20 nor more than \$100.

“SECTION 19. In every case where a note of a less denomination than \$5 is offered or issued as money, whether by a bank, corporation, or by individuals, the person, firm, or association of persons, corporation, or body politic so issuing, shall pay a fine of \$10.”

By the charter of the city of Richmond,² that city “may contract or be contracted with,” and is endowed generally with “all the rights, franchises, capacities, and powers appertaining to municipal corporations.” The charter also provides that “the council of the city may in the name and for the use of the city contract loans, and cause to be issued certificates of debt or bonds.”³

¹ By the express provision of the enactment the word “person” includes corporation.

² Chapter 54 of the code of 1849, p. 282, was followed by the act of March 30th, 1852 (Session Acts, p. 259), and the act of March 18th, 1861 (Ib. 153).

³ Sessions Acts, 1852, p. 265, § 46; 1861, p. 169, § 75.

In this state of things the city of Richmond, in April, 1861, upon the breaking out of the rebellion, passed an ordinance for the issue by the city of \$300,000. of corporation notes of \$2, \$1, 50 cents, and 25 cents; and the notes were accordingly issued; the city receiving in exchange the bank notes of the State then in circulation, between which and gold the difference at the time, compared with what it became subsequently, was small; five per cent to ten per cent.

On the 19th March, 1862, and the 29th of the same month and year, a so-called "legislature of Virginia," the body being composed of representatives from parts of the State in rebellion against the Federal government, passed an act, by whose language the issue of the sort of notes in question was made valid, and the city obliged to redeem them.

In October, 1868, the rebellion being now suppressed, and the city refusing to pay the notes, one Thomas and others, holders of a quantity of them, brought assumpsit against the city of Richmond, in the court below, to recover certain ones which they held. The declaration contained a special count on the notes and the common money counts. The defendants pleaded the general issue and the statute of limitations. A jury being waived, the case was tried by the court, which found:—

1st. That the notes were void when they were issued, because they were issued to circulate as currency, in violation of the law and policy of the State of Virginia, and,

2d. That the said notes were not made valid or recoverable by the acts of the 19th March, 1862, and 29th March, 1862, or either of them, because the said acts were passed by a legislature not recognized by the United States, and in aid of the rebellion.

The court accordingly gave judgment for the defendant. To review that judgment the case was brought here by the plaintiff.

Mr. *Conway Robinson* for the plaintiff in error.

Mr. *John A. Meredith*, *contra*, for the city.

Mr. Justice BRADLEY delivered the opinion of the court.

First. The court finds as a fact that the notes upon which the present action is brought were issued to circulate as currency; and, as matter of law, that this was in violation of the law and policy of Virginia, and that, therefore, the notes were void.

It is contended, however, that although the notes themselves should be deemed void, yet the city received the money therefor, and ought not, in conscience, to retain it; and, therefore, that the action can be maintained on the count for money had and received.¹

If the defendant were a banking or other private corporation, and had issued notes contrary to law, and had incurred penalties therefor, no penalty being imposed upon the receiver or holder of the notes, this argument might

¹ Only so much of the opinion is given as relates to the count for money had and received. 140.

be sound.¹ In the case of *The Onida Bank v. The Ontario Bank*,² in which the defendant had issued post notes contrary to a statute of New York, it was held that the holder could recover the money advanced therefor. "The argument for the defendant against this position," says Chief Justice Comstock, "rests wholly on the idea that Perry, in receiving the post-dated drafts, was as much a public offender as the bank or its officers issuing them. . . . But such were not the relations of the parties. . . . Whatever there was of guilt, in the issuing of the drafts, it was the creature of the statute. . . . By that authority, and that alone, the bank is prohibited from issuing, but not the dealer from receiving; and the punishment is denounced only against the individual banker, or the officers, agents, and members of the association. . . . If the issuing of the drafts was prohibited, and if they were also void, Perry, nevertheless, had a right to demand and recover the sums of money which he actually loaned to the defendant." This is in accordance with the general principles of law on this subject. Lord MANSFIELD, in *Smith v. Bromley*, as long ago as 1760, laid down the doctrine, which has ever since been followed, in these words: "If the act be in itself immoral, or a violation of the general laws of public policy, both parties are *in pari delicto*, but where the law violated is calculated for the protection of the subject against oppression, extortion, and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover."³ In that case the plaintiff had given the defendant money to sign her brother's bankrupt certificate, and she was allowed to recover it back, the law prohibiting any creditor from receiving money for such a purpose. Whilst the general principle has been frequently recognized, the application of it to particular cases has been somewhat diverse. Mr. Frere, in his note to *Smith v. Bromley*,⁴ thus sums up the result of the cases: A recovery can be had, as for money had and received, (1st) where the illegality consists in the contract itself, and that contract is not executed,—in such case there is a *locus penitentie*, the delictum is incomplete, and the contract may be rescinded by either party; (2d) where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender and the other only criminal from a constrained acquiescence in such illegal conduct,—in such cases there is no parity of delictum at all between the parties, and the party so protected by the law, or so acting under compulsion, may, at any time, resort to the law for his remedy, though the illegal transaction be completed.⁵

¹ *Smart v. Hyde*, 73 Me. 332; *White v. Franklin Bank*, 22 Pick. 181; *Curtis v. Leavitt*, 15 N. Y. 9, *accord.* — Ed.

² 21 N. Y. 496.

³ 2 Dougl. 696, n.

⁴ 2 Dougl. 697, a.

⁵ See the cases collected in 2 Comyn on Contracts, 108-131; 1 Selwyn's Nisi Prius, 87-100; 3 Phillips on Evidence, 119; 2 Greenleaf on Evidence, § 121, p. 120; Chitty on Contracts, 550, 552, 553, and notes.

6. 600 2
21. 20 9
5. 100 100 92

6. 13 10 91

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in some jurisdictions, it is not necessary to show that the contract is illegal, but that the party is a principal offender, and the other only a criminal from a constrained acquiescence in such illegal conduct.

Now, in cases of bills, or other obligations, illegally issued by a banking or other private corporation, which has received the consideration therefor, it would enable them to commit a double wrong to hold that they might repudiate the illegal obligations, and also retain the proceeds. Hence, where the parties are not *in pari delicto*, actions are sustained to recover back the money or other consideration received for such obligations, though the obligations themselves, being against law, cannot be sued on. The corporation issuing the bills contrary to law, and against penal sanctions, is deemed more guilty than the members of the community who receive them whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and, if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them. But if the parties are *in pari delicto*, as, if the consideration as well as the bills or other obligation is tainted with illegality or immorality, as it would be if loaned or advanced for the purpose of aiding in any illegal or immoral transaction, or if the receiving as well as passing or issuing the bills is forbidden by law, then the holder is without legal remedy, and the parties are left to themselves.

But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and speculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.

According to these principles no recovery could have been had against the city, either on the bills themselves or on a claim for money had and received. It was against the law of the State to issue them. It was a penal offence in both the person who paid and the person who received them, and they were issued by a municipal corporation which had no power, and which was known to have no power to issue them.

Judgment affirmed.

DAVID FOULKE v. THE SAN DIEGO AND GILA SOUTHERN
PACIFIC RAILROAD COMPANY.

IN THE SUPREME COURT OF CALIFORNIA, JULY TERM, 1876.

[Reported in 51 California Reports, 365.]

APPEAL from the District Court, Eighteenth Judicial District, County of San Diego.

On the 17th of September, 1872, the defendant, by its president, employed Isaac Hartman, an attorney-at-law, to conduct legal proceedings in the courts for the condemnation of certain lands in the city of San Diego, for the use of the defendant, and agreed to pay him therefor the sum of one thousand dollars. Hartman entered upon the performance of the services, and continued in the same until directed by the defendant to discontinue the proceedings. During the rendition of the services the defendant had notice of the same, through its officers, who frequently conferred with him in relation to the business. On the 13th of September, 1873, Hartman assigned his demand to the plaintiff, who brought this action to recover the same. The complaint contained a count on the special promise to pay one thousand dollars, and also averred that the services were worth that sum. The court found as a fact that the defendant agreed to pay one thousand dollars, but failed to find the value of the services, and rendered judgment for the plaintiff for the one thousand dollars. The defendant appealed from the judgment and from an order denying a new trial.

McConnell, Bicknell and Rothchild for the appellant.

A. Brunson for the respondent.

By the Court, McKINSTRY, J. Section 10 of the act of 1861, concerning railroad corporations, provides: "No contract shall be binding upon the company unless made in writing."

In *Pixley v. W. P. R. R. Co.*¹ it was held that the clause above quoted referred to executory and not to executed contracts, and that when a corporation takes and holds the benefit derived from the performance of a contract not in writing, it is liable to the extent of the benefit received.

There are indeed *dicta* in the opinions delivered in *Pixley v. Western Pacific Railroad Company*, to the apparent effect that where all has been done by the other contracting party which the contract requires of him, the corporation should be held to have ratified the express contract, and a recovery be had according to the terms of such contract.

But these were not called for by the circumstances of that case, which was an action on the *quantum meruit*.

¹ 33 Cal. 198.

The true rule to be deduced from the opinions in *Pixley v. Western Pacific Railroad Company*, is, the provision of the statute must be limited to contracts wholly executory. It cannot refer to those liabilities which the law itself implies from benefits received and actually enjoyed, where the services have been performed on the one side and received and enjoyed on the other.

In the last class of cases, however, the action must be brought upon the implied promise, and the recovery must be limited to the value of the actual benefit received.

The record of the case before us contains no finding of the value or reasonable worth of the services performed by plaintiff's assignor.

Judgment and order reversed, and cause remanded for a new trial.

ROBERT M. MORVILLE v. AMERICAN TRACT SOCIETY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 7, 1877.

[*Reported in 123 Massachusetts Reports, 129.*]

MOTION in the Superior Court to accept an award of three arbitrators upon a submission, entered into before a justice of the peace under the Gen. Sts. c. 147, § 1, of the following demand: "The right of R. W. Morville to recover from the American Tract Society the sum of \$5000 alleged to have been given in the month of March, 1869, by said Morville (under the assumed name of 'Union') to said society, and by said society to have been received and accepted upon certain conditions, to be by said society performed, which it is alleged have not been fulfilled, and for breach of which said sum is claimed with interest."

The award of the arbitrators, signed by all of them, after stating that the parties appeared before them, presented their evidence, and were heard by counsel, proceeded as follows: "Whereupon the undersigned considered the matter, and do now determine and award that the said Robert W. Morville shall receive and recover from the said American Tract Society the sum of \$1,600, which shall be in full for all claim for principal and interest upon the said demand submitted to us; and we do further award that the costs of this arbitration shall be paid by the said American Tract Society, which costs we do assess and tax at the sum of \$200."

The arbitrators annexed to the award the following writing as the foundation of the claim submitted to them:—

Boston, March 15, 1869. \$5000. The American Tract Society acknowledge the receipt of five thousand dollars from a friend, under the name of Union, to whom the same shall be repaid, in case the society is

not allowed to retain its catholic condition, and unless fifty thousand dollars be raised for evangelization purposes. JULIUS A. PALMER, Treas., by J. WYETH COOLIDGE, Ass't Treas'r.

On this paper was the following indorsement: BOSTON, May 20, 1870. It has been observed by the donor that the term of five years, in which the sum of \$50,000 was to be raised, was not specified in the receipt, and he requests me to state that that was the understanding, which I hereby do state and acknowledge.

J. WYETH COOLIDGE.

The defendant objected to the acceptance of the award, on various grounds, the following being those relied upon at the argument:—

“1. That it was not competent for the defendant to submit the demand to arbitration.

“2. That it was not competent for the defendant to make the contract.”¹

Judgment was ordered for the plaintiff upon the award; and the defendant alleged exceptions.

J. W. May for the defendant.

H. D. Hyde for the plaintiff.

COLT, J. The plaintiff paid five thousand dollars to the American Tract Society, under an agreement with the treasurer of that society that it should be repaid to him in case the society should not be allowed to retain its catholic condition, and unless fifty thousand dollars be raised within five years for evangelization purposes. A receipt for the money, signed by the treasurer, and reciting that agreement, was given to the plaintiff. There was a failure of one of the conditions named, but the society refused to pay the money back to the plaintiff.

The right of the plaintiff to recover the money so given was submitted by the parties to three arbitrators, by a submission entered into before a justice of the peace under the Gen. Sts. c. 147. An award in favor of the plaintiff was duly returned to the Superior Court, and many objections were there made by the defendant to its acceptance. It is necessary to consider only those which were relied on at the argument.

The defendant insisted that the contract made with the plaintiff and the submission to arbitration of the claims arising under it, were not within the chartered powers of the society.

The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied, where there is no positive restriction in the charter. Thus it is not necessary that there should be express authority to borrow money, or to make negotiable paper, if such is the usual and proper means of accomplishing that object. It is the pur-

¹ Only so much of the case is given as relates to this question. — Ed.

pose of the charter of the defendant to create a corporation with power to receive and expend for the purposes named all money given for immediate use. If this was all, there would be strength in the position that the power to receive and hold money to any considerable amount or for any great length of time, on deposit, or in trust for any purpose, was not conferred by the charter. But there is another clause which gives the right to hold real and personal estate for the purpose of securing a limited annual income to be appropriated to the objects of the society. Under this provision we think this contract can be supported. It must be treated as valid, unless it appears affirmatively to be a contract to do something which is beyond the reasonable exercise of the power granted. We cannot say as matter of law that the right given to a corporation to take and hold property for the purpose of securing a specified yearly income does not imply the right to receive money within the limits named, upon giving an agreement to return it upon conditions which are not illegal and do not violate its charter, and under which the income of the money is secured to the corporation, so long as the right to hold the fund so obtained continues. To hold otherwise would be to declare void many conditional gifts to charitable and educational institutions. It is enough that an award by arbitrators, having full power to settle the facts as well as the law between the parties, cannot be set aside because the defendant is held responsible on such a contract.

There is another answer to this objection which is equally satisfactory. The question is upon the acceptance of the award; no question of pleading is involved. The award is binding, if in any form of action the plaintiff is entitled to recover. If the defendant were to be allowed the full benefit of the point made, the plaintiff could only be prevented from enforcing his express contract. The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises when the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmation of an illegal act.

The right to recover the money upon the implied promise, under like circumstances, has been heretofore recognized by this court.

In *White v. Franklin Bank*,¹ where an express contract was made by a bank for the payment of a deposit at a future day certain, against the prohibition of the Rev. Sts. c. 36, § 57, it was held that, while no action could be maintained by the depositor upon the express contract, yet he might recover back the money, without a previous demand, in an action commenced before the expiration of the time, the parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract. The general proposition, that where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, it may be recovered back, was laid down in that case by WILDE, J., who declared it to be not only consonant with principles of sound policy and justice, but to have been now settled by authority, whatever doubt may have been formerly entertained. "To decide," he adds, "that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition."

Again, in *Dill v. Wareham*,² where a town made a contract with reference to certain fisheries within its limits which it had no authority to make, and which it refused to perform, it was decided that the plaintiff might recover back money paid in advance on the contract, as money had and received by the town to his use.

The same principle is recognized in New York. *Utica Ins. Co. v. Scott*;³ *Utica Ins. Co. v. Cadwell*;⁴ *Utica Ins. Co. v. Bloodgood*.⁵

Exceptions overruled.

THOMPSON v. WILLIAMS.

IN THE SUPREME COURT OF NEW HAMPSHIRE, MARCH, 1878.

[Reported in 58 *New Hampshire Reports*, 248.]

ASSUMPSIT for \$75, the price of two cows sold by the plaintiff to the defendant on Sunday. Fifteen days after the sale the plaintiff took the cows from the defendant, claiming that the title was not to pass until the price was paid. For that taking the defendant brought an action of trespass against the plaintiff, and recovered a judgment (the damages being assessed at \$75) on the ground (as the record shows) that the cows were the property of the defendant by virtue of the sale on Sunday, and the sale was absolute. That judgment the plaintiff has satisfied.

At the trial of this case the plaintiff was the sole witness. On cross-examination he testified that on the Sunday of the sale he was in his saw-

¹ 22 Pick. 181.

² 7 Met. 438.

³ 19 Johns. 1.

⁴ 3 Wend. 296.

⁵ 4 Wend. 652.

mill making repairs, when the defendant came in; that no one else was then present; that the defendant wanted to buy the cows, and they talked about a sale of them; that the defendant went down and saw them, and came back to the mill; that one Wiggin came in; that the defendant said he had been down to see the cows, and had made up his mind to give \$75 for them; that the plaintiff said he could not sell them for that, but finally concluded to accept the offer, and the bargain was made and the defendant drove them home; and that at each interview they talked a considerable time about the bargain.

The sale was not a work of necessity or mercy. The defendant moved for a nonsuit, on the ground that the sale was prohibited by the Sunday law.¹ The court denied the motion, and the defendant excepted. There was nothing for the jury, unless the question whether the sale was "to the disturbance of others" was a question of fact. The plaintiff claimed that the Sunday law is not a defence in this case, and that the defendant, having asserted and maintained his title under the Sunday sale in the former suit, is estopped in this action to set up the defence of Sabbatical illegality. Verdict for the plaintiff.

Hobbs for the defendant.

Small for the plaintiff.

SMITH, J. It is matter of law that whether any one besides the plaintiff and the defendant was present or not, the sale was business of the plaintiff's secular calling, done "to the disturbance of others," within the meaning of Gen. St. c. 255, s. 3. *Varney v. French*; ² *Smith v. Foster*; ³ *Bank v. Thompson*; ⁴ *George v. George*.⁵

The defendant is not estopped by the judgment in the trespass suit from setting up the Sunday law as a defence. The maxim *in pari delicto*, etc., was not established for the benefit of one party or of the other. The law does not leave the weaker at the mercy of the stronger, nor give the vendor a remedy by allowing him to retake the property illegally sold. It leaves the parties where their illegal contract left them: when executed, it will not assist the party who has parted with his money or property to recover it back; when executory, it will not compel performance. It would not leave the parties where their illegal contract left them if it did not maintain the title acquired by the contract. Williams was in possession of the cows, as of his own property, by the assent of Thompson. When the latter retook them, Williams was enabled to maintain trespass because Thompson could not be heard to controvert his title. *Smith v. Bean*; ⁶ *Coburn v. Odell*.⁷ The verdict must be set aside.

Nonsuit.

¹ Gen. St. c. 255, s. 3.

² 19 N. H. 233.

³ 41 N. H. 215.

⁴ 42 N. H. 369.

⁵ 47 N. H. 35.

⁶ 15 N. H. 579.

⁷ 30 N. H. 549, 552.

Commission 6, - 31, 1840.

(d.) *Wilfully or without Excuse.*

DUTCH *v.* WARREN.

AT GUILDHALL, BEFORE PRATT, C. J., MICHAELMAS TERM, 1721.

[*Reported in 1 Strange, 406.*]

CASE for money had and received to the plaintiff's use. The case was, the plaintiff paid money on a promise to transfer stock at a future day, which not being done the plaintiff brought this action. At the trial the doubt was, whether the plaintiff had brought a proper action, because at the time this money was paid the plaintiff never intended to have it again; and the promise to transfer the stock was a sufficient consideration for his parting with the money. The CHIEF JUSTICE directed the court should be moved; and they were all of opinion, that the action was well brought; not for the whole money paid, but the damages in not transferring the stock at that time, which was a loss to the plaintiff, and an advantage to the defendant, who was receiver of the difference money to the use of the plaintiff.

ANONYMOUS.

AT GUILDHALL, BEFORE KING, C. J., MICHAELMAS TERM, 1721.

[*Reported in 1 Strange, 407.*]

A MAN paid money on a contract for the old stock of a company, and the party gave him so many shares in the additional stock. Upon this the other brings his action for the money, as so much money had and received to his use. And the CHIEF JUSTICE held, it well lay, because the thing contracted for was not delivered: he said it would have been otherwise, if the thing contracted for had been delivered, though to a less value.

POWER *v.* WELLS. IDEM *v.* EUNDEM.

IN THE KING'S BENCH, MAY 23, 1778.

[*Reported in Cowper, 818.*]

UPON showing cause against a new trial, in the above causes, Mr. Justice ASHURST, before whom they were tried, reported as follows:—

The first was an action for money had and received, brought to recover a sum of 21*l.* paid by the plaintiff upon the exchange of a mare of his, for

a horse of the defendant, which the defendant warranted to be sound; but which was clearly proved to be unsound at the time. Immediately upon discovering that the horse was unsound, the plaintiff sent it back, together with a letter by a person who put the letter and halter into the defendant's hands in the defendant's yard, but he refused to take them. The person at the same time demanded the twenty guineas and the plaintiff's mare given in exchange; but the defendant said he had sold her, that he would have nothing to do with the person sent by the plaintiff, and turned him out of his yard. Upon which the plaintiff brought both the above actions.

The second was an action of trover for the mare; both causes stood for trial in the paper together. As to the first, an objection was made at the trial to the form of the action, and I was very doubtful how far it was maintainable. But it was agreed that I should sum it up to the jury, and if they should be of opinion with the plaintiff upon the facts proved, then, instead of making a special case, it should be put in the form of a motion for a new trial. The jury found for the plaintiff. As to the second action, it was agreed that a verdict should be taken for the plaintiff upon the evidence given in the first cause, but with liberty to move for a new trial; and it was understood between the parties, that the defendant should be entitled to the same redress in both causes, in case the opinion of the court should be in his favor, as if the whole had been stated in the form of a case.

Upon showing cause, the question was, Whether the above actions were rightly conceived? or, Whether the plaintiff should not have brought a special action on the case?

Mr. *Wheeler* for the plaintiff.

Mr. *Newnam* for the defendant.

The court were of opinion that both actions were misconceived. First, the action for money had and received, with no other count, was an improper action to try the warranty. Second, the action of trover could not be maintained, because the property was transferred by the exchange. Accordingly a nonsuit was ordered to be entered up in both causes.

TOWERS v. BARRETT.

IN THE KING'S BENCH, FEBRUARY 7, 1786.

[*Reported in 1 Term Reports, 133.*]

ACTION for money had and received, and for money paid, laid out, and expended.

On the trial of this cause before Lord MANSFIELD, at the sittings at Westminster after last Michaelmas term, it appeared that this suit was

instituted by the plaintiff to recover ten guineas, which he had paid to the defendant for a one-horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it, paying 3s. 6d. *per diem* for the hire of it. This contract was made by the defendant's servant, but his master did not object to it at the time. The plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it; the hire of 3s. 6d. *per diem* was tendered at the same time, which the defendant refused, as well as to return the money.

After a verdict had been given for the plaintiff, Sir *Thomas Davenport* obtained a rule to show cause why a nonsuit should not be entered on the ground that this action for money had and received would not lie, but that it should have been on the special contract.

Erskine now shewed cause. This case is very distinguishable from those of *Power v. Wells*¹ and *Weston v. Downes*,² on which this rule was obtained. In the former of those cases, it was determined that a warranty could not be tried in an action for money had and received; and in the latter, that such an action did not lie, the payment having been made on a contract which was still open, and disputed by the defendant. But this is the very case put by Mr. Justice ASHHURST,³ where he said this action would have lain.

The principle is this: where a man enters into a contract for a sale, and he warrants that the object of that sale shall be of a certain denomination, and he does no act to disallow that contract, there money had and received will lie against him; but where the warranty is disputed, that must be tried in an action on the special contract. In the present case, there was no warranty; it was only a sale on condition which failed. And it was held in *Moses v. Macferlan*⁴ that an action for money had and received will lie to recover money paid by mistake, or upon a consideration which happens to fail.

Sir *Thomas Davenport* in support of the rule. Wherever there is a special contract, whether conditional or absolute, or in whatever terms it may be conceived, so long as that contract remains open to be disputed, and the party has done nothing to acknowledge the contract, or to preclude himself from entering into the nature of it, the defendant ought to have notice on the declaration that he is sued on that contract.

The cases of *Power v. Wells* and *Weston v. Downes* are decisive as to the present. This comes within the principle laid down by Mr. J. BULLER in the latter of those cases, where he said, "Where the contract is open, it must be stated specially."

The chaise was left on the premises, but the defendant refused to receive it: then the question is, whether the plaintiff had a right to return it? and how that right is to be tried?—There are several matters here in controversy, which cannot be tried in an action for money had and received:

¹ Cowp. 818.

² Dougl. 23.

³ Dougl. 24.

⁴ 2 Burr. 1012.

1st, Whether in fact there were any contract; 2dly, The extent of it; and, 3dly, What the plaintiff ought to have paid *per diem* for the hire; for it is open on this declaration to say that the defendant ought to have had 5s. *per diem*, as well as 3s. 6d.

When the party has done anything to preclude himself from going into the contract, then money had and received will lie; but here the defendant disputes it.

LORD MANSFIELD, C. J. I am a great friend to the action for money had and received; it is a very beneficial action, and founded on principles of eternal justice.

In support of that action, I said in the case of *Weston v. Downes*, that I would guard against all inconveniences which might arise from it, particularly a surprise on the defendant; as where the demand arises on a special contract, it should be put on the record. But I have gone farther than that; for if the parties come to trial on another ground, though there happen to be a general count for money had and received, I never suffer the defendant to be surprised by it, unless he has had notice from the plaintiff that he means to rely on that as well as the other ground.

But consistently with that guard, I do not think that the action can be too much encouraged. Here there is no pretence of a surprise on the defendant; there was no other question to be tried. The defendant knew the whole of the matter in dispute as well as the plaintiff. On what ground can it be said that this is not money paid to the plaintiff's use? The defendant has got his chaise again, and, notwithstanding that, he keeps the money.

The case was well put by Mr. J. ASHHURST in *Weston v. Downes*, and I think this is exactly like that. I was of opinion at the trial that this action would lie; and I still continue of that opinion.

WILLES, J. The only difficulty is to distinguish this case from that of *Weston v. Downes*; and I think it differs from that on two grounds.

That was an absolute, this a conditional agreement. And another more material difference is, that this agreement was at an end; the contract was no longer open.

In the case of *Weston v. Downes*, Mr. J. BULLER said, "This action will not lie, as the defendant has not precluded himself from entering into the nature of the contract, by taking back the last pair of horses." But, in the present case, the defendant has precluded himself by taking back the chaise. I think the verdict is right.

ASHHURST, J. This action is maintainable; for it is different from the cases of *Weston v. Downes* and *Power v. Wells*. The latter was merely a case of warranty. In these actions the party cannot desert the warranty and resort to the general count, because the warranty itself is one of the facts to be tried.

As to that of *Weston v. Downes*: on the first contract there was an

agreement to take back the horses, provided they were returned within a month: that would have been like the present case, if they had been returned within that time; but there was an end of the first contract, for the plaintiff took a second, and then a third pair of horses: that was a new contract, not made on the terms of the first, and that is distinguishable from the present case.

But laying that determination out of the question, this is like the common cases where either party puts an end to a conditional agreement. Here the condition was to return the chaise if not approved of; therefore, the moment it was returned the contract was at an end, and the defendant held the money against conscience and without consideration.

BULLER, J. On the very principle in *Weston v. Downes* and *Power v. Wells*, which determined that the action for money had and received would not lie in those cases, it is clear that this action will lie.

It is admitted that if the defendant had actually accepted the chaise the action would lie; but it has been contended that he did not receive it. Then let us see whether there be not something equivalent to an acceptance? I think there is, from the terms of the contract. There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise when it was offered to him; he was bound to receive it, and therefore it is the same as if he had accepted it.

The distinction between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie. But if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of that contract.

In a late case before me on a warranty of a pair of horses to Dr. Compton that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time, I held that if the plaintiff would rescind the contract entirely he must do it within a reasonable time, and that as he had not rescinded the contract he could only recover damages; and then the question was, what was the difference of the value of horses of four or five years old?

So that the difference in cases of this kind is this: where the plaintiff is entitled to recover his whole money, he must show that the contract is at an end; but if it continue open, he can only recover damages, and then he must state the special contract and the breach of it.

Rule discharged.

GILES AND OTHERS v. EDWARDS.

IN THE KING'S BENCH, MAY 5, 1797.

[*Reported in 7 Term Reports, 181.*]

THIS action for money had and received was tried at the last Shrewsbury assizes before Mr. J. LAWRENCE. On the 6th of June, 1791, the defendant agreed to sell to the plaintiffs all his cord-wood growing at Tredgodoer in Shropshire, at 11s. 6d. per cord ready cut; the wood was to be coaled and cleared from off the premises by Michaelmas, 1792, and the money was to be paid on the 1st of March, 1792. It also appeared that the custom was for the seller to cut off the boughs and trunks and then cord it, and for the buyer to re-cord it, after which it became the property of the buyer. The defendant cut sixty cords, ten of which he corded, and the plaintiffs recorded half a cord and measured the rest. On the 8th of March, 1792, the plaintiffs paid the defendant twenty guineas; but the defendant neglecting to cord the rest of the wood, the plaintiffs brought this action to recover back the twenty guineas, as having been paid on a contract that had failed.

It was objected at the trial that this action could not be maintained, the contract being still open, and that the plaintiffs should have brought a special action on the case for non-performance of the contract, on the principle established in *Weston v. Downes*,¹ *Power v. Wells*,² and *Towers v. Barrett*.³ That the plaintiffs could now abandon the contract altogether, as they had acted under it. But the learned judge was of opinion that, as it was owing to the fault and negligence of the defendant that the contract which was entire was not carried into execution, the plaintiffs were at liberty to consider the contract at an end, and recover back the money that they had paid, the consideration having failed. That what had been done by the plaintiffs could not be considered as an execution of the contract in part, for that all that they had done was merely to measure the wood and re-cord a very small part of it. The plaintiffs obtained a verdict; to set aside which, and to enter a nonsuit, a motion was now made by

Wyllie on the above ground: but

The court were clearly of opinion that the directions given at the trial were right.

LORD KENYON, C. J., said, this was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract and recover back the money that they had paid under it; they were not bound to take a part of the wood only.

Rule refused.

¹ Dougl. 23.

² Cowp. 518.

³ 1 T. R. 133.

CARTWRIGHT v. ROWLEY.

AT *Nisi Prius*, BEFORE LORD KENYON, C. J., FEBRUARY 19, 1799.[*Reported in 2 Espinasse, 723.*]

ASSUMPSIT for money had and received.

The plaintiff was the patentee of a steam-engine, and had employed the defendant, who was an engine-maker, to make some engines for him, under the patent. In the progress of the work the plaintiff had advanced several sums of money to the defendant, which he sought now to recover back, on the ground that the defendant had been so inattentive to the order, and so long in completing the engines, that the opportunity of disposing of them was lost, so that they became useless to the plaintiff. The ground relied upon to establish the plaintiff's right to recover in this action was, that the money was paid without any consideration; the work for which it had been given having been rendered, by the defendant's own default, of no value to the plaintiff.

Erskine, Gibbs, and F. Vaughan for the plaintiff.*Garrow, Dampier, and Best* for the defendants.

LORD KENYON, C. J. This action cannot be maintained, nor the money recovered back again by it; it has been paid by the plaintiff voluntarily; and where money has been so paid, it must be taken to be properly and legally paid; nor can money be recovered back again by this form of action, unless there are some circumstances to show that the plaintiff paid it through mistake, or in consequence of coercion. I recollect a case of——*v. Pigott*, where this action was brought to recover back money paid to the steward of a manor for producing at a trial some deeds and court-rolls, and for which he had charged extravagantly. The objection was taken, that the money had been voluntarily paid, and so could not be recovered back again; but it appearing that the party could not do without the deeds, so that the money was paid through necessity and the urgency of the case, it was held to be recoverable.

The plaintiff was nonsuited.

HULLE v. HEIGHTMAN.

IN THE KING'S BENCH, JANUARY 27, 1802.

[*Reported in 2 East, 145.*]

INDEBITATUS ASSUMPSIT for wages due to the plaintiff as a seaman on board a Danish ship, whereof the defendant was captain, from Altona to London. Plea *non assumpsit*. At the trial before LE BLANC, J., at the

sittings after last term at Guildhall the plaintiff proved a service in fact as a seaman on board the ship at and from Altona until her arrival at the port of London. And it appeared that after the ship had delivered her cargo here, the captain would not give the seamen victuals, but bid them go on shore, saying he could get plenty of their countrymen to go back for their victuals only since the peace. That the plaintiff and others went on shore, and when the captain required them a few days afterwards to go on board again, they refused, saying it was too late, for they had the law of him. (They had then brought actions against him.) That previous to his departure for Denmark he again required them to come on board, which they again refused. The defence rested on certain written articles of agreement signed by the plaintiff and the rest of the crew, whereby it appeared that they were hired for the voyage from Altona to London and back again. And there was an express stipulation, that the seamen should assist in bringing the ship back again and making her fast in a proper place, before they could make any demand upon the captain for the wages due, under a certain penalty; and another stipulation that no person should in foreign parts demand any money of the captain, but be contented with the wages received in advance, until the voyage was completed to the satisfaction of the captain and owners, and the ship and goods again safely arrived at Altona. And also that it should at all times be at the captain's own option whether he would give them any money in foreign parts or not. That in like manner no person should demand his discharge in foreign parts, but be obliged to perform the voyage. It concluded with a general clause of obedience to the captain, and for the performance of the duty of the crew; and that if any one should show himself averse therein, he should not only according to law forfeit the whole of his wages, but also suffer punishment, etc. On proof of this agreement it was insisted by the defendant's counsel at the trial, that the plaintiff had mistaken his remedy, and that an action of *indebitatus assumpsit* would not lie, but that he ought to have declared specially. On the other hand it was contended, that the plaintiff might recover in this form of action for the rate of his wages up to the time when he was wrongfully turned out of the ship. But Mr. Bayne, J., being of opinion that the wrongful act of the captain did not rescind the special contract by which the plaintiff was precluded from demanding his wages till the end of the voyage; though it gave a cause of action against the captain for the tort whereby the plaintiff was prevented from earning his wages under the contract, directed a nonsuit; with leave to move to set it aside and enter a verdict for the plaintiff for 6*l.* 17*s.*, the amount of the wages due to him at the time he left the ship, if he were entitled to recover.

Gibbs now moved accordingly.

The court, referring to the case of *Weston v. Downes*,¹ as establishing the

¹ Dougl. 23.

principle that while the special contract remained open and not rescinded by the defendant, the plaintiff could not recover on the general counts in assumpsit, held that the nonsuit was proper, the contract still operating, and *Refused the rule.*

MUSSEN v. PRICE.

IN THE KING'S BENCH, JUNE 28, 1803.

[*Reported in 4 East, 147.*]

THIS was an action for goods sold and delivered, tried before ROOKE, J., at the last Lancaster assizes; and the only question was, Whether the action were commenced before the time of credit on which the goods had been contracted to be bought was expired? The goods in question were a quantity of cotton, valued at 217*l.*, for which payment was to be made by the defendants in three months after the 15th of September 1802 (the day on which the bargain was concluded), by a bill of two months. The action being commenced in Hilary term last, before the expiration of five months from the 15th of September preceding, the defendant's counsel objected that it was prematurely brought, and therefore that the plaintiff should be nonsuited; but the learned judge held, that unless the defendants could show (which they did not do) that they had given or tendered such a bill at the end of the three months, the action would lie for goods sold and delivered. Accordingly the plaintiff recovered, but the point was saved for the consideration of the court. And in the last term *Raine* obtained a rule *nisi* for setting aside the verdict and entering a nonsuit, principally upon the authority of a case of *Millar v. Shaw*, at Lancaster Lent assizes, 1801, before CHAMBRE, J., where the plaintiff was nonsuited on a similar objection.

Cockell, Serjt., *Holroyd*, and *Yates* now showed cause against the rule.

Topping and *J. Clarke*, *contra*.

LORD ELLENBOROUGH, C. J. The only question here is as to the form of declaring. There is no doubt but that the plaintiff might have recovered by bringing his action on the special contract, and laying the breach for the non-delivery of a bill at the end of the three months. But the question is, whether he has not also this remedy. And, if it were not for the authority of the case cited before Mr. Justice CHAMBRE, whose opinion is entitled to great weight, I should have thought that this was an absolute agreement for a credit of three months, with a stipulation on behalf of the defendant, that at the end of the three months he should be at liberty to give the plaintiff a bill at two months for payment, which was to be taken as such if the condition were performed; and such it is always considered

in that part of the country. But still the bargain between the parties was for a credit of three months. That was the leaning of my mind before I heard of the decision of the learned judge which has been relied on ; and so, I must own, it is in some degree still. And I think the plaintiff's argument was well illustrated by the case put, of a man taking in payment for goods a bill drawn by the vendee on another, payable at a future time. There if the bill be dishonored, it is in common experience that the payee may bring his action immediately ; and yet, taking the whole transaction together, it might as well be said in that case, that there was a credit given for so many months as the bill had to run ; and that before that period the only remedy of the party was a special action on the case for the damage, by reason of the dishonoring of the bill. But no such action has ever been brought, though the occasion must have often occurred. Whatever respect therefore I feel for the opinion which has been cited, the present feeling of my mind is that this action is well brought.

GROSE, J. This action is not brought upon an express assumpsit between the parties, but upon an assumpsit implied in law. Then how does the case stand? Two persons agree on what terms the one will buy and the other sell certain goods. The seller offers them at a certain price ; but the buyer says that he cannot pay for them at once, but at the end of three months he will give his bill payable at two months. The seller assents to this offer, because at the end of three months' time he expects to have a bill which he can negotiate, and thereby raise money. This then is no implied contract whereon to raise an implied assumpsit, but an express contract including the terms on which the one agreed to buy and the other to sell, for the non-performance of which the party has his remedy in damages. The action then ought to have been brought for the not giving the bill, which the defendant had undertaken to do, and not for goods sold and delivered, in which case the promise is to be implied from the circumstances of the case. But this is not the case of an implied but of an express promise.

LAWRENCE, J. I am of the same opinion. The proper ground of action is the non-performance by the defendant of his agreement with the plaintiff. That agreement was that the defendant should pay for the cotton in a particular way, namely, that at the expiration of three months he should give the plaintiff his bill payable at two months. Then how was the contract broken? By not giving at the end of three months his bill at two months ; for which breach of contract the remedy lies in damages. That therefore was the mode in which the action should have been brought : in which action the plaintiff would have recovered damages against the defendant for his not having given the bill, such as the loss of interest, etc., and the action should not have been on a promise to pay the value of the goods before the expiration of the credit. The argument for the plaintiff goes upon an assumption that the giving of the bill was a condition upon

which the credit was to be extended beyond the three months. But I see no condition in the contract. If it had been, that if at the end of three months the defendant could give a bill at two months the plaintiff should take that in payment, there might have been some foundation for the argument; but there are no words of condition. The giving of the bill at two months was a term introduced into the contract for the benefit of the seller, that at the end of three months he might have in his hands an instrument which he could negotiate. If the credit had been given generally for the whole five months, he would have been out of cash all the time; but he was to give the defendant the benefit of five months' credit, while he had only the disadvantage of giving it for three months. As to the case put of a bill payable at a future day given for payment, upon which, if dishonored, the drawer may be immediately sued, I think a good answer was given to it at the bar. If there were no agreement for time, the party takes it as payment; and therefore if it turn out to be good for nothing, the creditor has not received that which the other undertook to give him, and may therefore pursue his remedy immediately.

LE BLANC, J. I think this action was brought before the time for which I consider that credit was given to the defendant. Here is an express promise proved between the parties. The seller was to stand upon the credit of the defendant alone for three months, and then he was to have in addition a third person's credit for two months longer; so that altogether the defendant was to have credit for five months before he was called upon to pay. But he will not have the benefit of his contract if he be called upon for the full sum before the expiration of the five months' credit. The cases alluded to, and which have only occurred at *nisi prius*, have been where goods have been sold, and a bill taken in payment payable at a future day, but without any express contract for time for the payment of the goods; and thereupon, the bill being dishonored, the drawer has been sued immediately. But I should think even in those cases, if the jury found that the agreement really was for time, that the same objection might be made to the action as in this case. In general however the goods are considered as sold for a ready-money price, only the seller takes a bill as ready-money payment. In this view of the case I think the present action is not maintainable; and that the plaintiff should have been nonsuited. And in all cases, without express authority to the contrary, it is better to keep the forms of action as distinct as possible, instead of running one into another.

*Rule absolute.*¹

¹ Dutton *v.* Solomonson, 3 B. & P. 582, *accord*.

After the expiration of the period of credit, the plaintiff could have brought an action for goods sold and delivered. Brooke *v.* White, 1 N. R. 330; Helps *v.* Winterbottom, 2 B. & Ad. 431. — ED.

HUNT v. SILK.

IN THE KING'S BENCH, NOVEMBER 9, 1804.

[Reported in 5 East, 449.]

IN assumpsit for money had and received, the facts appeared at the trial before Lord ELLENBOROUGH, C. J., at the last sittings at Westminster, to be these. On the 31st of August, 1802, an agreement of that date was made between the parties, whereby the defendant, in consideration of 10*l.* to be paid at the time of executing the lease after mentioned, and for other considerations therein stated, agreed that within ten days from the date thereof he would grant to the plaintiff a lease of a certain dwelling-house for nineteen years (determinable by the plaintiff in five, ten, or fifteen years) from the 29th of September then next (but possession to be immediately given to the plaintiff), at the yearly rent of 63*l.* And the defendant also agreed at his own expense to make certain alterations in the premises, and that the premises, fixtures, and things should at the time of executing the lease be put in complete repair. And the plaintiff, in consideration of the aforesaid, agreed to accept the lease at the rent and in manner aforesaid, and to execute a counterpart, and pay the rent. The plaintiff took immediate possession of the premises under the agreement, and paid the 10*l.* at the same time, in confidence that the alterations and repairs stipulated for would be done within the ten days; but that period and some days after having elapsed, and nothing being done, notwithstanding several applications to the defendant to perform the work, the plaintiff quitted the house, giving the defendant notice of his having rescinded the agreement in consequence of the defendant's default, and brought this action to recover back the money he had paid. Lord ELLENBOROUGH, however, thought that the plaintiff was too late to rescind the contract, and that his only remedy was on the special agreement, and therefore directed a nonsuit. Which

Reader now moved to set aside, and to have a new trial, on the authority of *Giles v. Edwards*.¹

Lord ELLENBOROUGH, C. J. Without questioning the authority of the case cited, which I admit to have been properly decided, there is this difference between that and the present; that there by the terms of the agreement the money was to be paid antecedent to the cording and delivery of the wood, and here it was not to be paid till the repairs were done and the lease executed. The plaintiff there had no opportunity by the terms of the contract of making his stand, to see whether the agreement were performed by the other party before he paid his money, which the plaintiff

¹ 7 T. R. 181.

in this case had ; but instead of making his stand, as he might have done, on the defendant's non-performance of what he had undertaken to do, he waived his right, and voluntarily paid the money ; giving the defendant credit for his future performance of the contract, and afterwards continued in possession notwithstanding the defendant's default. Now where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of; the parties cannot be put *in statu quo*.

GROSE, J., of the same opinion.

LAWRENCE, J. In the case referred to, where the contract was rescinded, both parties were put in the same situation they were in before. For the defendant must at any rate have corded his wood before it was sold. But that cannot be done here where the plaintiff has had an intermediate occupation of the premises under the agreement. If indeed the 10*l.* had been paid specifically for the repairs, and they had not been done within the time specified, on which the plaintiff had thrown up the premises, there might have been some ground for the plaintiff's argument that the consideration had wholly failed; but the money was paid generally on the agreement, and the plaintiff continued in possession after the ten days, which can only be referred to the agreement.

LE BLANC, J. The plaintiff voluntarily consented to go on upon the contract after the defendant had made the default of which he now wishes to avail himself in destruction of the contract. But the parties cannot be put in the same situation they were in, because the plaintiff has had an occupation of the premises under the agreement. *Rule refused.*

ATTY AND ANOTHER v. PARISH AND ANOTHER, EXECUTORS OF
R. CHARNOCK.

IN THE COMMON PLEAS, NOVEMBER 21, 1804.

[Reported in 1 *Bosanquet & Puller, New Reports*, 104.]

THIS was an action of debt for the carriage of divers goods, wares, and merchandises, carried and conveyed in divers ships and vessels from and to divers places, and for the use and hire of divers other ships and vessels from and to divers places, and for demurrage before that time due and of right payable by the defendant's testator for his detention of divers other ships

and vessels employed by him. There were other counts in debt for money had and received, money paid, and on an account stated. The defendants pleaded *nil debent*.

At the trial of this cause before Sir JAMES MANSFIELD, C. J., at the Guildhall sittings after last Trinity term, the plaintiffs, after proving the carriage of the goods of the defendant's testator and the detention of the plaintiff's ship, gave in evidence a charter-party entered into between themselves and the defendant's testator, to ascertain the amount agreed upon for freight and demurrage. Upon this it was objected that the plaintiffs must be nonsuited, not having declared upon the charter-party. His Lordship permitted a verdict to be given for the plaintiffs with liberty to the defendants to move that a nonsuit should be entered.

Accordingly, a rule *nisi* for that purpose having been obtained,

Shepherd and Bagley, Serjts., now showed cause. The plaintiffs were well warranted in their mode of declaring, and the evidence offered in support of the declaration was properly received. Wherever the statement of a contract between parties appears upon the face of a declaration to be such that the plaintiffs might equally recover, whether the contract be by deed or not, though the contract in point of fact be by deed, it is not necessary for the plaintiff to declare upon the deed. If, indeed, the contract be such that unless it be entered into by deed the plaintiff cannot recover, then he must declare upon the deed. If, in an action for goods sold and delivered, or for wages, it should appear that the price of the goods or the *quantum* of the wages was settled by deed, it would be no ground of nonsuit that the plaintiff had not declared upon the deed; for the debt would arise upon the meritorious consideration of the delivery of the goods, or the labor performed, and not upon the deed; since the deed itself, though it might be material to establish the *quantum* of price, would be immaterial to the ground of action. Thus, in debt for rent, the declaration alleges the debt as arising from the occupation of the premises, and the indenture of demise is mere matter of evidence. *Kemp v. Goodall*; ¹ *Warren v. Consett*.² If the deed be only inducement to the action, it need not be shown to the court.³ In *Hardres*, 332, it is said in argument that where an action of debt is grounded upon a matter *in pais* only, as upon prescription; or upon a deed that is not requisite to maintain the action, as for rent reserved upon a lease by deed, *nil debet* is a good plea. The reason why in debt for rent it is not necessary to declare upon the deed is, that the debt does not arise from the deed, but from the occupation. So here the debt arises from the use and occupation of the ships, not from the charter party. The only difference between the two cases is, that one respects land, and the other a personal chattel. It is true that in the case of a bond the declaration must state the bond; the reason of which is, that there is no foundation for the obligation except the solemnity

¹ 1 Salk. 277.

² 5 Mod. 107.

³ Com. Dig. tit. Pleader, O. 15.

of the instrument entered into between the parties ; and it matters not, provided the bond be proved, whether any consideration for the deed appear. Then in truth the existence of the bond is the gist of the action. In considering this case, some attention must be paid to the distinction between actions of assumpsit and actions of debt. In the former, an agreement must be declared upon, because no implied promise can be raised where an express promise has been reduced into writing by the parties ; but in an action of debt no promise is necessary to support the action, inasmuch as the action is founded upon that obligation which arises by law out of the circumstances of the case. The issue on this record is, whether the plaintiff's testator was indebted or not. Now, suppose a special verdict, in which the jury were to find that the defendant was indebted, but that he was indebted by deed, and the plaintiff had not declared upon a deed, would he not be entitled to recover? [CHAMBRE, J. The declaration here imports nothing more than a parol agreement ; and the issue is, whether the defendant be indebted *modo et forma*.]

Best, Serjt., contra. The plain rule has always been, that where a deed is the foundation of the action, that deed must be stated upon the record, in order that the court may judge of its contents and ascertain whether its provisions be legal or illegal. The true question in this case is not whether the defendant be indebted to the plaintiff, but whether he be indebted in the manner in which the plaintiff alleges. If there be any contract between these parties, it is a contract by deed ; and wherever there is any such express contract, the plaintiff is precluded from setting up any other contract. In *Thursbey & Hall v. Plant*¹ it is said that a lessor cannot maintain debt for rent against the original lessee after assignment, but only covenant ; which shows that the action of debt for rent is not founded upon the contract. When an action is founded on a deed, the deed must be shown to the court.² Now, the action in this case is founded on a charter-party, and in such actions it has hitherto been the universal practice to declare upon the charter-party. The case of debt for rent is an excepted case.

The court took time to consider the matter until the next day, when their opinion was delivered by

Sir JAMES MANSFIELD, C. J. In this action of debt the plaintiffs have declared that the defendant was indebted to them in a certain sum of money, without specifying any particular time at which it was to be paid, for the carriage of divers goods conveyed in divers ships from and to divers places, for the use and hire of divers other ships from and to divers places, and for the demurrage of divers other ships employed by the defendant's testator. This declaration, therefore, is as general in its form as can possibly be conceived ; nor are any of the peculiar circumstances even hinted at. The declaration would lead us to suppose that the

¹ 1 Sid. 401.

² Com. Dig. tit. Pleader, O. 3.

defendant's testator had entered into a contract respecting the subjects on which he is now charged, in the most general way in which such contracts can be entered into (though with respect to demurrage, I take it to be perfectly clear that there is no particular custom of trade which fixes the rate of payment, but that it is always regulated by express stipulation); and that the money having become due, the amount was to be ascertained by the law. To support this declaration at the trial, a contract of charter-party under seal was produced; which contract was extremely long, and very particular in the provisions which it contained. The defendant's testator appears to have endeavored to secure himself by very special covenants from any misconduct on the part of the master, and to have stipulated that no freight should be paid for the outward voyage, but that when the ship should have performed her homeward voyage, and all the covenants contained in that charter-party, that then she should have earned her freight. These covenants therefore amount in fact to conditions precedent. The charter-party contains other covenants for the payment of such demurrage as is therein mentioned, and freight for and upon every ton of goods that should be brought into the port of London, to be paid in the manner set forth in the charter-party, and not otherwise. The covenants, therefore, in this charter-party are as special as can be imagined. Such, then, being the agreement between the parties, what is the foundation of the contract upon which the present action is brought? Unquestionably, the deed of charter-party is that which comprehends everything by which the defendant's testator was bound. Are we, then, to say that all the precedents in pleading are now for the first time to be overturned, and the defendant to be deprived of the advantage of having a *profert* made of that deed which is the foundation of the action in which he is sued? Having stated the declaration and the deed, I do not know in what manner I can more strongly argue against the form of the declaration. If it be admitted, as it must be, that wherever the action is founded on a deed, the deed must be declared upon, I would ask, is not the action in this case founded on the charter-party? A course of argument has been adopted which either I do not understand or do not feel the application of. It has been said that where a party may recover in an action, whether such action be founded on a deed or not, the party may recover without declaring on the deed, though the contract be reduced into a deed; and in support of this, it has been contended that if goods be sold or wages earned, and the price of the goods or the amount of the wages be ascertained by deed, yet inasmuch as goods may be sold and wages earned without the intervention of a deed, the person who sues for money due to him on account of such sale or earnings, may recover without declaring on the deed. But no case has been cited to maintain that argument; and it seems to me absurd to contend that the action is not founded on a deed because if there had been no deed the

action might have been well maintained without it. The only case excepted from the general rule is that of debt for rent, in which the deed need not be declared upon. That exception, however, seems to have proceeded on the ground that by the demise an interest has passed in the land. In the case cited from Hardres, though it is said that in debt for rent reserved upon a lease by deed *nil debet* is a good plea, yet it is added that in debt upon a grant of an annuity not issuing out of land, such a plea would not be good; and the same distinction is made in *Warren v. Consett*. Since, therefore, all the books speak of the case of debt for rent as an exception, it is strong evidence to show that in all other cases a deed must be declared upon. This action is founded upon a charter-party, — a form of instrument upon which many actions are tried every year; nevertheless the mode of declaring here adopted has never been heard of in Westminster hall till now. I have perhaps said more than was necessary upon so plain a case, and I have now only to add that we are all of opinion that a nonsuit must be entered.

Per Curiam,

*Rule absolute.*¹

COOKE *v.* MUNSTONE.

IN THE COMMON PLEAS, JULY 3, 1805.

[*Reported in 1 Bosanquet & Puller, New Reports, 351.*]

ASSUMPSIT. The first count of the declaration was for not delivering 35 chaldrons of soil or breeze, according to a special contract between the defendant and the plaintiff; to which the money counts were added.

At the trial before Sir JAMES MANSFIELD, C. J., at the Guildhall sittings in this term, it was proved that the defendant having agreed to supply the plaintiff with 35 chaldrons of soil at seven shillings per chaldron, the plaintiff paid 2*l.* 5*s.* as earnest; that the plaintiff afterwards sent his barge and demanded the soil, offering at the same time to pay the remainder of the purchase-money as soon as the soil should be put on board, but that the defendant refused to deliver it on account of a dispute with the plaintiff respecting the wharf from whence it should be loaded. It appearing, however, that soil and breeze were very different things, it was objected for the defendant that as the plaintiff had declared upon a contract for the delivery of soil *or* breeze, and had only proved a contract for the delivery of soil, he must be nonsuited; whereupon the plaintiff insisted that he was entitled to a verdict for 2*l.* 5*s.* on the count for money had and received. His Lordship thought that as the plaintiff had proceeded upon a contract which never appeared to have been rescinded by

¹ *Middleditch v. Ellis*, 2 Ex. 623, *accord.* *Conf. Tilson v. Warwick Gas Light Co.*, 4 B. & C. 962. — Ed.

any act or agreement between the parties, but only broken by a refusal of one party to perform it, he was not at liberty to recover the deposit upon the count for money had and received, and accordingly nonsuited the plaintiff, but gave him liberty to move that the nonsuit should be set aside, and a verdict entered for him, if the court should be of opinion that he was entitled to it.

Accordingly, a rule *nisi* for that purpose having been obtained,

Best, Serjt., showed cause.

Shepherd, Serjt., *contra*.

Cur. adv. vult.

On this day the opinion of the court was pronounced by

Sir JAMES MANSFIELD, C. J. This was an action for the non-delivery of soil or breeze according to a contract entered into between the parties, and for which money had been paid by way of earnest. There was also a count for money had and received. The framers of the special count in the declaration unfortunately supposed soil and breeze to be the same thing; but the fact proving otherwise, the plaintiff failed in establishing that count. He then wanted to go into evidence on the count for money had and received, in order to recover back what had been paid by way of earnest. The case appears to me unlike any of those cited. If the plaintiff were allowed to go into the evidence for which he contends, the consequences might be serious; he seeks to recover, not upon the contract on which he has declared, but upon a different contract, and upon a ground which the defendant could not possibly be prepared to meet. In *Giles v. Edwards* the plaintiff had no other demand against the defendant than that for the 10*l.* 10*s.* paid to him, — which constitutes the difference between that case and the present. The case of *Towers v. Barrett* has no resemblance to the present; the special contract there being at an end, the money paid in respect of that contract was to be returned, and might therefore be recovered under the general count. Indeed, the cases in which it has been decided that a plaintiff may, if he fail on his special contract, resort to a general *indebitatus assumpsit*, are unlike the present in this respect: that in truth the special contract is put altogether out of the case as not being properly complied with. But in this instance it would be very strange to allow the plaintiff to recover on a general *indebitatus assumpsit*, and still leave him his right of recovery for non-performance of the special contract. It is said, however, that he has a right to insist on the special contract and on the general contract at the same time, recovering under the one his damages for non-performance, and under the other his money paid; but the cases only warrant a permission to the plaintiff to resort to his general count when his special contract has failed altogether. I apprehend the rule to be this: where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such that, supposing there had been no special contract, he might still have recovered for money paid or for work

and labor done. As in the case of a plaintiff suing a defendant as having built a house for him according to agreement; there, if he fail to prove that he has built it according to agreement, he may still recover for his work and labor done. In Buller's *Nisi Prius*¹ the rule is thus laid down: "If a man declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from what is laid, he cannot recover on either count, — not on the first, because of the variance; nor on the second, because there was a special agreement; but if he prove a special agreement, and the work done, but not pursuant to such agreement, he shall recover upon the *quantum meruit*, for otherwise he would not be able to recover at all." In *Payne v. Bacomb*,² I suppose there was a special agreement by the defendant to pay a share of the expenses of the suit in the Exchequer, but that agreement had not been strictly pursued by him; and consequently he recovered for the money actually laid out by him to the defendant's use, on evidence of his connection with the defendant in that suit, and the obligation of the latter to pay. That case, therefore, proceeds on the ground that there was no special agreement still subsisting and in force between the plaintiff and defendant, on which the former was entitled to recover. In this case, if we were to allow the plaintiff to go into the evidence which he offered, it would amount to saying that there was no evidence of a subsisting special agreement; when in truth there was such evidence. The consequence of such a rule would be to introduce the means of practising great surprise upon defendants.

Per Curiam,

Rule discharged.

PAYNE v. WHALE.

IN THE KING'S BENCH, FEBRUARY 11, 1806.

[*Reported in 7 East, 274.*]

THIS was an action for money had and received, to recover back the price of a horse which had been warranted sound by the defendant to the plaintiff. Shortly after the original bargain was made (of which there was no proof except by the subsequent conversation), and the money paid, the plaintiff objected that the horse was a roarer and unsound, and tendered back the horse, and demanded his money: the defendant admitted that he had made the warranty, but denied the unsoundness, and refused to take back the horse or return the money; but told the plaintiff that if the horse were unsound, he would take it again and return the money. At the trial after last Trinity term at Guildhall these facts were proved, and that the horse was a roarer and unsound. But it was objected on the part of the defendant, that the action was misconceived; for that the question to be

¹ Ed. 2, p. 139, — *Weaver v. Burrows*.

² 2 Dougl. 651.

tried was the unsoundness, which was the subject of the warranty, and could not be tried in this action, the contract not being rescinded, but only in a special action on the case founded on the warranty. Lord ELLENBOROUGH, C. J., however, then thought that the special promise to rescind the contract and return the money, if the horse were unsound, took this out of the general rule: and he therefore suffered the plaintiff to recover a verdict for the amount of the price paid. And in Michaelmas term last, a rule *nisi* was obtained for setting it aside and having a new trial, upon the authority of *Power v. Wells*¹ and *Weston v. Downes*,² which established the principle, that where the contract of warranty is still open, assumpsit for money had and received will not lie by the vendee to recover back the price of the goods warranted: though in the latter case there was a similar promise to take back the horses warranted, if the plaintiff disapproved of them and returned them within a month; which was offered to be done but refused. The case stood over till this term, when

Garrod and Murrell showed cause against the rule.

Erskine and *Laws* in support of the rule.

Lord ELLENBOROUGH, C. J., then said, that as the cases ran very near to each other, and this would give the rule to many others, the court would consider of the case before they gave their opinion; as they wished to proceed upon some sound and clear principle which would not break in upon established cases which had become the habitual law of the land, such as actions of this sort against stakeholders, or for returns of premium. That if the question were upon the warranty, there was no doubt that the action was misconceived; the only doubt was, whether the promise to take back the horse if unsound and return the money, did not make a difference.

His Lordship now shortly delivered the opinion of the court. This was a cause tried before me at Guildhall to recover back the price of a horse sold as a sound horse, and which proved to be unsound. It was to be collected from the evidence, that there had been a warranty of soundness at the time of the original contract of sale; but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, that if the horse were unsound he would take it again, and return the money. And it was contended that the action for money had and received would not lie, upon the authority of *Power v. Wells* and *Weston v. Downes*, because this was no other than a mode of trying the warranty, which could only be by a special action on the case. It had occurred to me at the trial, that the defendant, by means of his promise to return the money and take back the horse if it were unsound, had placed himself in the situation of a stakeholder, and therefore that on proof that the horse was unsound he was to be considered as holding the money for the use of the plaintiff. But upon further consideration I am clearly satisfied that that promise did not discharge the original warranty, and that the party complaining of the

¹ 1 Cowp. 817.

² 1 Doug. 23. See also *Hull v. Heightman*, 2 East, 145.

breach of that warranty must still sue upon it. The second conversation is not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted upon; but rather as a declaration that if the warranty were shown to be broken, he would do that which is usually done in such cases, — take back the horse and repay the money. Then where any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action upon the warranty.

Nonsuit to be entered.

BEED v. BLANDFORD.

IN THE EXCHEQUER, MAY 9, 1828.

[*Reported in 2 Younge and Jervis, 278.*]

ASSUMPSIT for money had and received, and the usual money counts. Plea, the general issue. — At the trial, which took place before Mr. Justice PARK, at the Lent assizes, 1827, for Hampshire, it appeared in evidence, that the plaintiff was the master and part owner of the vessel called the Albion, of which the plaintiff and John Blandford, the brother of the defendant, were in the year 1817 registered owners. In that year, John Blandford's moiety was assigned, by indorsement on the registry, to Isaac Blandford, the son of the defendant, who advanced the purchase-money; and in the year 1824, a bill of sale, purporting to be in consideration of 231*l.* but upon which no money passed at the time, of the moiety of Isaac Blandford, was executed by him to his father, the defendant. In the year 1824, the plaintiff entered into a verbal agreement with the attorney of the defendant for the purchase of his moiety, at the sum of 140*l.*, which it was stipulated should be paid on the day following the agreement, when the bargain was to be completed. On the day on which the money was to be paid, the defendant's attorney was from home, but left written instructions how the business was to be arranged between the parties, of which the following is a copy: —

“Deliver to Beed the bill of sale from John Blandford to Isaac Blandford, and the assignment from Isaac Blandford to Thomas Blandford, on Beed's paying 120*l.*, and giving a note of hand, on stamp, in these words.” Here followed the form of a promissory note to the defendant, at six months, for 20*l.*

“Out of the 120*l.*, give Thomas Blandford 30*l.*, and pay the remaining 90*l.* into Grant's bank, to the credit of my account.

“Do not part with the deeds to any person until the 120*l.* be paid, and the promissory note is given by Beed.

“If the man who lends Beed the money wants a security, he can hold the deeds till I return home, or he can get a proper security prepared.”

Pursuant to these instructions the plaintiff paid to an agent of the defendant's attorney 110*l.*, and gave a promissory note for the balance of 30*l.*, when the papers were delivered to him, and pledged by him as a security for the money. The note was subsequently paid. From this time the plaintiff had the possession of the vessel, but having in vain applied to the defendant and his attorney for a bill of sale of the moiety of the vessel which he contracted to purchase, or for a return of the money, he brought the present action, to recover from the defendant the sum of 120*l.* as money paid. It was proved, by the defendant's witnesses, that, after the contract, Isaac Blandford was joint owner of the vessel, until his death, and that the defendant was his administrator. Upon which it was contended by the counsel for the defendant, — first, that the money was advanced by the plaintiff on behalf of Isaac Blandford, and that the action should have been brought against the defendant, as his representative; and secondly, that the action for money had and received could only lie where the consideration had totally failed, and the parties could be reinstated in their former situation, which could not be in this case, where, from the time of the contract, the defendant had had no participation in the profits of the vessel; and that, at all events, the deeds delivered to the plaintiff ought to have been tendered to the defendant before the action was brought. The learned judge left the first question, as a question of fact, to the jury; who found, that the money had been paid to the defendant by the plaintiff on his own behalf. He overruled the second objection; and the jury having found a verdict for the plaintiff, the learned judge gave the defendant leave to move to enter a nonsuit, if this court should think his direction wrong.

In Easter term, 1827, Selwyn obtained a rule to show cause why the verdict should not be set aside, and a nonsuit entered. He urged, that this action could only be sustained upon the contract being rescinded, which it could not be unless it were rescinded *in toto*, and the parties restored to their former situation; that, in this case, there had been an immediate occupation, and a part execution of the agreement, which was incapable of being rescinded; and he relied upon the case of *Hunt v. Silk*,¹ as an authority for that doctrine.

Williams, C. F., and *Manning* showed cause.

Selwyn and *Carter, contra*, were stopped by the court.

ALEXANDER, L. C. B. This was an action of assumpsit for money had and received, brought by the plaintiff against the defendant, to recover the money paid by the former to the latter, as the consideration for the purchase of the moiety of a vessel, upon the ground of that contract having been rescinded. In order to sustain an action in this form, it is necessary that the parties should, by the plaintiff's recovering the verdict, be placed in the same situation in which they originally were before the contract was

¹ 5 East, 419.

entered into. The plaintiff has by his intermediate occupation derived the profits of the vessel ; if he has not he might have done so ; and it is impossible to say what the defendant might have made had he, during the time, had any control over it. Under these circumstances, it cannot be said that the situation of the parties has not been altered ; and that, by the plaintiff's recovering in this action, their original position may be restored. Besides this, the defendant's title deeds have been deposited by the plaintiff as a security for the money advanced to him. How could the defendant, in this respect, be restored to his original situation by this action ? He is at the mercy of the plaintiff for his title deeds, and cannot recover them by any process in this cause. I think the objection is unanswerable, and that the rule for a nonsuit must be made absolute.

HULLOCK, B. I am of the same opinion. This case cannot be distinguished from that of *Hunt v. Silk*, with which decision I am perfectly satisfied.

VAUGHAN, B. Both the law and justice of this case are with the defendant ; for it would be manifest injustice to permit the plaintiff to have possession both of the ship and title deeds, and to recover the purchase-money also. The decision in *Hunt v. Silk* lays down a very clear and just rule in these cases : if the circumstances be such, that by rescinding the contract the rights of neither party are injured, in that case, if one contracting party will not fulfil his part of the engagement the other may rescind the contract, and maintain his action for money had and received, to recover back what he may have paid upon the faith of it. *Giles v. Edwards* does not impeach this doctrine, for there the parties were restored to their original situation ; for which reason that authority does not at all apply to the present case.

Rule absolute.

PLANCHÈ v. COLBURN.

IN THE COMMON PLEAS, NOVEMBER 5, 1831.

[*Reported in 8 Bingham, 14.*]

THE defendants had commenced a periodical publication, under the name of "The Juvenile Library," and had engaged the plaintiff to write for it a volume upon Costume and Ancient Armor. The declaration stated, that the defendant had engaged the plaintiff for 100*l.* to write this work for publication in "The Juvenile Library ;" and alleged for breach, that though the author wrote a part, and was ready and willing to complete and deliver the whole for insertion in that publication, yet that the defendants would not publish it there, and refused to pay the plaintiff the sum of 100*l.* which they had previously agreed he should receive. There were then common counts for work and labor.

At the trial before TINDAL, C. J., Middlesex sittings after last term, it appeared that the plaintiff, after entering into the engagement stated in the declaration, commenced and completed a considerable portion of the work; performed a journey to inspect a collection of ancient armor, and made drawings therefrom; but never tendered or delivered his performance to the defendants, they having finally abandoned the publication of "The Juvenile Library," upon the ill success of the early numbers of the work. An attempt was made to show that the plaintiff had entered into a new contract.

The Chief Justice left it to the jury to say, whether the work had been abandoned by the defendants, and whether the plaintiff had entered into any new contract; and a verdict having been found for him, with 50*l.* damages.

Spartan, Serjt., moved to set it aside.

TINDAL, C. J. In this case a contract had been entered into for the publication of a work on Costume and Ancient Armor in "The Juvenile Library." The considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author, who has engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings published as a separate and distinct work, and therefore liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children. The fact was, that the defendants not only suspended, but actually put an end to "The Juvenile Library;" they had broken their contract with the plaintiff; and an attempt was made, but quite unsuccessfully, to show that the plaintiff had afterwards entered into a new contract to allow them to publish his book as a separate work.

I agree that, when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*: part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned: and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labor; and there is no ground for the application which has been made.

CASSELL, J., concurred.

ROSEVELL, J. The plaintiff is entitled to retain his verdict. The jury have found that the contract was abandoned; but it is said that the plaintiff ought to have tendered or delivered the work. It was part of the contract, however, that the work should be published in a particular shape; and if it had been delivered after the abandonment of the original design, it might have been published in a way not consistent with the plaintiff's reputation, or not at all.

ANDERSON, J., concurred, and the learned Serjeant

Took nothing.

HARRISON v. LUKE.

IN THE EXCHEQUER, MAY 7, 1845.

[*Reported in 14 Meeson & Welsby, 139.*]

DEBT for goods sold and delivered, and on an account stated. Plea, *nunquam indebitatus*. This was a case tried before the Recorder of Hull under a writ of trial. The plaintiff was an oil and colorman residing at Hull, and the defendant a shipowner at Charlestown, in Cornwall; and it appeared that on the 27th of July, 1839, the defendant wrote a letter to the plaintiff, stating that he had a yellow ochre mine, and should the plaintiff be a purchaser of ochre he would supply him with any quantity, and would take goods for it. To this letter the plaintiff returned the following answer: "I have no objection taking eight or ten tons of ochre, and you take paint, or any other article, in exchange. Should you feel inclined to barter, please let me know as early as possible." The parties accordingly supplied each other, and continued to deal on this footing for some time, exchanging paint for ochre, until March, 1841, when the balance was in the plaintiff's favor; and in a postscript to a letter, dated the 1st of March, 1841, from the plaintiff to the defendant, the plaintiff requested defendant to send ochre "to balance our account." No more ochre, after this time, was received by the plaintiff. The action was brought in December, 1844. At the trial it was objected for the defendant, that the plaintiff ought to be nonsuited, as, the transaction being one of barter, he was not entitled to recover the value of the goods in money. The learned Recorder directed a verdict for the plaintiff for the amount proved, giving leave to the defendant to move to enter a nonsuit.

Bain having obtained a rule accordingly,

Archbold now showed cause.

Bain, contra, was stopped by the court.

POLLOCK, C. B. I am of opinion that this rule ought to be made absolute. Where there is a contract of barter, and one of the parties omits to send goods in return, it cannot be contended that the other may bring an action for goods sold. No mere lapse of time will turn a contract of barter into a contract for goods sold.

PARKE, B. The plaintiff's remedy is by an action against the defendant for not delivering the ochre pursuant to the contract between them. The ground of Lord ELLENBOROUGH's decision in *Ingram v. Shirley*¹ was, that the parties, by stating a balance of 25*l.* to be due, intended that amount to be paid in money. But, if there be a contract of barter, you cannot

¹ 1 Stark. N. P. 185.

change that into a contract to pay in money, unless the parties come to a fresh agreement to that effect. The defendant's not sending the ochre is a breach of the old agreement only.

ALDERSON, B., and ROLFE, B., concurred.

*Rule absolute.*¹

PAUL v. DOD.

IN THE COMMON PLEAS, APRIL 16, 1846.

[*Reported in 2 Common Bench Reports, 800.*]

DEBT for goods sold and delivered, work and labor and materials, money paid, and money found due upon an account stated.

The defendants severally pleaded, never indebted.

The cause was tried before Lord DENMAN, C. J., at the last assizes at Kingston. The facts were as follows: The defendant Dod, in the early part of the year 1845, applied to the plaintiff, an upholsterer, to complete the decoration and furnishing of a house in his occupation, called Dagnells Park, near Croydon. The plaintiff declined to do so without security; whereupon the defendant Holmes was offered and accepted as Dod's surety. The estimated value of the goods to be supplied at first was between 80*l.* and 100*l.*, which it was agreed should be paid 30*l.* in cash, and the residue by bills of 30*l.* each succeeding three months. Subsequently, however, the order was, with the assent of Holmes, extended to 244*l.* By the direction of Holmes, the goods were invoiced to Dod and himself jointly. The 30*l.* were not paid, nor were any bills given. The last supply took place on the 2d of April, 1845. The action was commenced on the 6th of January, 1846.

On the part of the defendants, it was objected, first, that there was no evidence of any joint contract by the two; and, secondly, that the action was prematurely brought, inasmuch as the full period of credit agreed on had not expired; and Lord DENMAN, yielding to the objections, nonsuited the plaintiff, reserving to him leave to move to enter a verdict, if the court should be of opinion that the goods were furnished and the work done on the joint credit of the two defendants; and for such sum as upon the evidence they might think the plaintiff entitled to; the court to be at liberty to draw any inference of fact that the jury might under the circumstances have drawn.

Channell, Serjt., now moved accordingly.

TINDAL, C. J. I think there ought to be no rule in this case. No part

¹ It was held in *Sheldon v. Cox*, 3 B. & C. 420, that the count for goods sold and delivered would lie to recover money due, that portion of the contract which contemplated an exchange having been performed. — *Ed.*

of the goods can be singled out for payment by cash. The contract was, to pay for the entire goods, 30*l.* in cash, and the residue by instalments of 30*l.* at each succeeding three months, to be secured by bills. The plaintiff should have declared upon the special contract, under which the defendants would have been clearly liable. He cannot, however, maintain an action upon an implied contract, until the expiration of the period at which the entire debt would have become due. The case of *Nickson v. Jepson*¹ does not apply. There, the extended credit of three months was subject to a condition to be performed on the part of the defendant. Not having performed that condition, his right to such extended credit never accrued.

COLTMAN, J. The payment of the 30*l.* was not, as has been contended by my brother *Channell*, a condition. The agreement was, simply, that the defendant should pay 30*l.* in cash, and the rest of the debt by bills at certain intervals. The action, therefore, was brought too soon.

CRESSWELL, J. I am of the same opinion. It is impossible to say that any particular portion of these goods was sold for a money payment. I agree with the view taken by my brother COLTMAN, that the credit was not conditional upon the payment of the 30*l.* in cash. It was one entire contract for a cash payment of 30*l.*, with a certain credit for the residue.

ERLE, J. I also am of opinion that this was one entire contract upon one consideration, and one entire promise. The payment of the 30*l.* was not a condition.

Rule refused.

FEWINGS v. TISDAL.

IN THE EXCHEQUER, NOVEMBER 18, 1847.

[*Reported in 1 Exchequer Reports, 295.*]

INDEBITATUS ASSUMPSIT for work and labor as a hired servant, and on an account stated.

Plea, *non assumpsit*.

At the trial, before the under-sheriff of Bristol, in August last, it appeared that the plaintiff had been in the defendant's service as cook, but that from some suspicions which he entertained about her, he had dismissed her without any previous warning, but that he had paid her her wages up to the time of her dismissal. This action was brought to recover a month's wages, commencing from the day of her discharge from the defendant's service. The under-sheriff nonsuited the plaintiff, on the ground that the declaration should have been special, and that the plaintiff could not recover under the common count for work and labor.

Montague Smith having obtained a rule to set aside the nonsuit,

¹ 2 Stark. N. P. 227.

Greenwood showed cause.

M. Smith, contra.

POLLOCK, C. B. I am of opinion that this rule should be discharged. This was a special contract between the parties, and I think that the undersheriff ruled correctly that the present claim for a month's wages could not be recovered on the common count for work and labor. The argument of Mr. *Smith*, founded upon the case of *Eardley v. Price*, is, that this month's wages should be considered as a compensation for bygone services. If that argument were held to be good, the result would be, that when parties make a bargain, whatever the terms of it may be, the court would be at liberty to substitute any other contract, provided the same conclusion should be arrived at, and that this should be done for the purpose of obtaining what might appear to the court to be justice between the parties. Such a rule would be dangerous, and it is difficult to say where we should stop. It amounts to this, that provided you can show that another set of terms come to the same practical conclusion, the court is at liberty to substitute them for the real contract between the parties. In the present case, the servant claims a month's wages for being turned away without a month's warning. As far as regards the amount of the mere claim, it is the same as if the master were to pay her the additional sum for bygone services for discharging her without a month's warning. But this is not, I think, the contract. I regret that the party is unable to recover her claim in this form of count; it is not the proper form, but it should have been a *special one*. The case of *Archard v. Hornor* governs the present; it has been recognized by all the courts, and has been acted upon in this court, in the case of *Broxham v. Wagstaffe*.¹

PARKE, B. I agree with the opinion expressed by the Lord Chief Baron. The good sense of the matter is to be found in *Archard v. Hornor*, which was afterwards confirmed by the Court of Queen's Bench in the case of *Smith v. Hayward*, and also by this court. It is not broken in upon by the case of *Smith v. Kingsford*, which proceeded on a different ground. The contract in the present case is, that the service is for the year, but the master is at liberty to dismiss the servant by giving her a month's wages or warning. It is a refinement to say that these wages are a compensation for bygone services. *Eardley v. Price* broke in upon the rules of law, perhaps in order to do what appeared to be justice in that particular case. *Archard v. Hornor*, in my opinion, governs the present case.

ALDERSON, B. I am of the same opinion. When we say that the servant is to have a month's warning or a month's wages, it is meant that the payment to be made for the dismissal without warning is to be by way of compensation, and that the amount is to be equal to a month's wages.

ROLLE, B., concurred.

Rule discharged.

¹ 5 Jur. 845.

EHRENSPERGER v. ANDERSON.

IN THE EXCHEQUER, DECEMBER 8, 1848.

[Reported in 3 Exchequer Reports, 148.]

DEBT for money had and received, and for money due on an account stated. Plea, *nunquam indebitatus*; upon which issue was joined.

At the trial, before Lord DENMAN, C. J., at the Hertford spring assizes, 1848, it appeared that the plaintiff was a merchant carrying on business in London, and the defendant a partner in the firm of Alexander Anderson & Co., merchants and commission agents at Bombay; and the action was brought to recover 681*l.*, being the net proceeds of twenty cases of Swiss cottons, sold by Alexander Anderson & Co., at Bombay, on the plaintiff's account, in August, 1847. In the year 1844, Messrs. Cruikshank, Melville, & Co., consigned to the house of Campbell, Dallas, & Co., merchants and commission agents at Bombay, the above-mentioned cottons for sale, with directions to hold them until a favorable opportunity for sale should occur; and, after the sale, to hold the money until a favorable opportunity of remittance, and then to remit the proceeds of the sale to London by bills of exchange at six months' sight. In March, 1846, Cruikshank, Melville, & Co. applied to the plaintiff for an advance upon the consignment of the cottons; and the plaintiff having made it, on the 25th March, 1846, Cruikshank, Melville, & Co. wrote to the plaintiff a letter, of which the following is an extract:—

“In consideration of your having advanced us 845*l.* 12*s.* 6*d.*, upon twenty cases plain red cottons, shipped to Bombay, ten cases per ‘London,’ and ten cases per ‘Hindustan,’ both in October, 1844, and consigned to Messrs. Campbell, Dallas, & Co., there, for sale, we hereby assign over to you the said shipments, and undertake to pay over the proceeds to you as soon as received by us. We inclose a few lines to Messrs. Campbell, Dallas, & Co., instructing them to make the remittance to you direct.”

Campbell, Dallas, & Co. afterwards discontinued business, and were succeeded by the firm of Alexander Anderson & Co., in which the defendant was a partner. On the 25th March, 1846, Messrs. Cruikshank, Melville, & Co. wrote to the defendant's firm at Bombay, as follows:—

DEAR SIRS, — Upon referring to Messrs. Campbell, Dallas, & Co.'s letter of 1st December last, relative to the twenty cases plain red Swiss cottons, per “London” and “Hindustan,” we are in expectation of hearing, by an early mail, that they have been sold, and of receiving the remittance; but, should the remittance not have been made at the time you receive this

letter, we request you will make it direct in good bills to Messrs. C. Ehrensperger & Co., of this city, to whom these goods belong, and who will, if requisite, give you their own instructions respecting them.

We remain, etc.,

Cruikshank, Melville, & Co.

On the 4th April, 1846, the plaintiff wrote to the defendant's firm at Bombay a letter, of which the following is an extract:—

"By the inclosed letter of Messrs. Cruikshank, Melville, & Co., you will perceive, that henceforth you are to consider us the owners of twenty cases plain red cottons, per 'London' and 'Hindustan.' We request you will favor us, by return of mail, with your confirmation that such transfer is made, and that you will account for the same to ourselves. If, however, in the mean time, the goods have been sold, be kind enough to favor us with particulars, and how remitted; for if such has not taken place, we request that you will proceed with the sale, either partially or wholly, as best to our interests, remitting proceeds as sales may be effected; at all events, we trust within six months to be favored with the returns in good bills on London."

On the 1st October, 1846, the defendant's firm wrote to the plaintiff in reply, a letter containing the following passages:—

"We are in receipt of your much esteemed and valued favor, under date 4th April, which came to hand on the 28th May last, informing us to consider you the owners of twenty cases of plain red cottons, and to effect sales of them at an early date. In reply we beg to state that we forwarded a copy of your letter to our Mr. Anderson a long time ago, who, we trust, might have spoken to you on this head."

The firm of Cruikshank, Melville, & Co. was succeeded by Melville & Co.; and, in August, 1847, Messrs. Anderson & Co., at Bombay, sold the cottons, and acquainted Melville & Co. with the fact, by letter dated 30th August, 1847, of which the following is an extract:—

"We beg to advise a sale of twenty cases of Turkey red plain cloth at 8 rupees and $3\frac{1}{2}$ annas per piece, belonging to Messrs. C. Ehrensperger & Co., and regret to say, that the buyer has not yet taken delivery of the same. This has prevented us from sending you an account of the sales and remittance to cover the proceeds, which shall be sent forward by the ensuing mail of the 15th proximo."

A copy of the above extract was sent by Messrs. Melville & Co. to the plaintiff, by letter dated the 5th October, 1847. On the 11th September, 1847, Anderson & Co. wrote to Melville & Co. a letter, of which the following is an extract:—

"The rate of exchange here has given a decline to 1s. 11d. for first-rate bills. We therefore hold Messrs. C. Ehrensperger & Co.'s sales of twenty

cases Turkey red plain cloth until due dates, as it will leave a great deal loss in present state of exchange ; but if we see an improvement before that, we shall lose no time to remit the proceeds.”

On the 1st November, 1847, Anderson & Co. wrote to Melville & Co. a letter, of which the following is an extract :—

“For the gradual rise in exchange you will hear from our Mr. Anderson, to whom we write at length by this mail. Annexed you have a memorandum of account of Mr. Ehrensperger’s sale of Turkey red cloth ; and, upon reference to it, you will observe that we have allowed you interest at the rate of 9/100 per cent from the date of the closing of the sales, and from the surplus amount the remitting 1/100 per cent commission has been deducted. Referring to the register of our remittances, we now beg to hand you drafts as under.”

The letter set out several drafts, amongst which were two on J. Bagshaw, amounting to 700*l.* “to cover C. Ehrensperger, 681*l.*” It then stated : “The above drafts are forwarded to our Mr. Anderson at home, who will hand them over to you on application.” Melville & Co. having communicated to Ehrensperger & Co. the above extract as to the remittances, the latter applied to Mr. Anderson for the drafts, and a correspondence took place between Ehrensperger & Co., Melville & Co., and Mr. Anderson, the latter of whom, by letter, dated the 30th December, 1847, wrote to Ehrensperger & Co. as follows :—

“The drafts on Bagshaw, referred to in the letter from Bombay, were inclosed to me with several other drafts, and accompanied by a detailed list of payments to which they were to be appropriated, but all consisting of drafts by Alexander Anderson & Co. upon Melville & Co., and no mention whatever is made of your claim in my letters. These remittances have accordingly been applied as advised ; but I have every reason to suppose that the proceeds due to you by Melville & Co. will be remitted by my firm to them, upon receipt in Bombay of the last mail from hence, in which I advised them of the mistake made in advising these bills to Melville & Co. for your account.”

Ehrensperger & Co., not being able to obtain the drafts or the proceeds of the cottons, brought the present action on the 8th January, 1848.

On the part of the defendant it was objected, that the present action could not be maintained, as the proceeds of the sale were to be remitted by bills ; and that the plaintiff ought to have declared specially for the breach of contract ; and further, that no action for money had and received would lie, as the proceeds of the sale were not received in money, but in rupees. A notice to produce the letter of the 25th March, 1846, was served, on the 3rd February, 1848, on the defendant in London, the firm having no place of business there. The plaintiff tendered a copy or

that letter as secondary evidence, which was objected to by the defendant's counsel, but received by the learned judge, who reserved leave for the plaintiff to move to enter a nonsuit on the above points. The defendant attempted to prove that there had been a re-transfer of the consignment to Melville & Co., in consideration of an advance by them to the plaintiff of 600*l.*; but a letter produced for that purpose was inadmissible for want of a stamp: and a verdict having been found for the plaintiff for 681*l.*,

Channell, Serjt., in Easter term last obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved: against which

Stee, Serjt., and *Bramwell* showed cause.

Channell, Serjt., and *Peacock*, in support of the rule.

Cur. adv. vult.

PARKE, B., now said — This case was argued a short time ago, at the sittings in term. It was an action brought by the plaintiff against the defendant, Mr. Anderson, for money had and received; and the question was, whether, under the circumstances, an action for money had and received would lie. The action was commenced in January, 1848; and it appeared upon the trial, that the house of Cruikshank, Melville, & Co. had consigned to the house of Campbell, Dallas, & Co., at Bombay, a quantity of cottons for sale; and it would appear upon the evidence, that the directions were to hold the cotton until a favorable opportunity occurred, and, after the cottons were converted into money, to hold the money until a favorable opportunity occurred for a remittance; and finally, to remit the proceeds of the sale to London, in bills of exchange, — whether at six months or not, is immaterial to the present question. Campbell, Dallas, & Co. discontinued business, and were succeeded by the firm of Anderson & Co.; and Mr. Anderson, one of the firm, came over to England, and was then sued, as I said, in the month of January, 1848, for money had and received for the proceeds of this cotton. It appeared, that, after the consignment of the cottons had taken place, Cruikshank, Melville, & Co., who were desirous of having an advance of 800*l.* and upwards, upon the consignment of the cottons, applied to Mr. Ehrensperger, who made that advance, and then there was an agreement that the consignment of the cottons should be transferred to Mr. Ehrensperger, and that Campbell, Dallas, & Co., who were now represented by the defendant, should be responsible to Ehrensperger & Co. for the disposition of the goods and the remittance of the proceeds; and the house of the defendant, it is argued, stands in precisely the same situation as Campbell, Dallas, & Co., and the single defendant stands in the same situation as his firm. Then it appears, that, afterwards, a communication took place between Melville & Co., who had succeeded Cruikshank, Melville, & Co., and Mr. Ehrensperger, in which Mr. Ehrensperger required an advance from them of 600*l.*; and one of the points which were made at the trial, and afterwards upon the motion for a new trial, was, that there had been, with the consent of all parties, a sub-

sequent re-transfer of the consignment in the hands of the defendant to Melville & Co. from Mr. Ehrensperger. There was certainly some evidence of such transfer, possibly incomplete in any view of the case; but that evidence failed, in consequence of a letter which was to prove this transfer and which required a stamp, not being stamped. Therefore, we may throw out of the case entirely any agreement arising out of the alleged subsequent re-transfer of this consignment and its proceeds from Mr. Ehrensperger to Melville & Co. Then it further appears, that the defendant's house afterwards, in the month of August, disposed of these cottons, and received the proceeds; and the question is, whether they are responsible to the plaintiff for these proceeds in an action for money had and received.

Now, several objections were taken to the plaintiff's right to recover. One, which was incidentally mentioned, was, that no action for money had and received would lie, because the proceeds of this sale were not received in money, but were received in rupees.¹ Upon that objection, certainly, we consider that the plaintiff is not prevented from recovering. There are two authorities on the subject: one of these is a case of *Harington v. Macmorris*,² in which an objection having been made, that the money received was foreign money, Lord Chief Justice GIBBS, then Mr. Justice GIBBS, treated that objection as having been exploded for thirty years. The real meaning of such a count is, that the defendant is indebted for money of such a value or amount in English money. However, the objection appears to have been listened to, perhaps more than it ought to have been, in a subsequent case of *M'Lachlan v. Evans*; ³ but the Court of Exchequer held that an action for money had and received for English money would not lie, unless there had been a reasonable time, after the receipt of the foreign money, to convert it into English. Possibly that case cannot be received as being very satisfactory; at all events, we do not decide this case against the plaintiff on this ground.

It then appears that the defendant's house at Bombay disposed of these cottons in the month of August in 1847, and they then write to Messrs. Melville & Co., who must now be considered as their agents and correspondents, because there is no sufficient evidence of the transfer of the right to Melville & Co. — they write to Melville & Co., and tell them that two of the bills which they remit, amounting to 700*l.*, are sent to Mr. Anderson for the purpose of paying the amount of 600*l.* and upwards to Messrs. Ehrensperger; and, at the same time, they wrote another letter to Mr. Anderson, in which they made no mention of the plaintiff's claim. Then a correspondence takes place between Messrs. Ehrensperger, Melville & Co., and Mr. Anderson, which results in the plaintiff not obtaining any satisfaction for the proceeds of this consignment. The question is, whether,

¹ As to what will support the allegation of money received in the count for money had and received, see Leake, *Digest of Law of Contracts*, 117. — ED.

² 1 Marsh, 33; 5 Taunt. 228.

³ 1 Y. & J. 380.

under these circumstances, an action for money had and received will lie? I have before said, that the objection that it was foreign money ought not in our judgment to prevail; at all events, we shall not decide the case upon that:—then, the only way in which the plaintiff can recover in an action for money had and received is, upon the ground that this is money in the hands of the defendant, and originally placed there for the purpose of purchasing bills, in order to make a remittance, and that that money has become money had and received, by the countermand not to apply it any longer to that purpose; or, secondly, that the plaintiff is in a condition to say that the contract has been rescinded on the part of the defendant, and that he is entitled to recover from the defendant the money which was placed in his hands for the purpose of purchasing bills for a remittance. With respect to the countermand, there is no evidence of it. The question therefore resolves itself into this, — whether we can come to a conclusion upon this evidence, that the plaintiff is in a situation to say to the defendant, “You have got money which you received from me, and you have rescinded the contract, and I am therefore entitled to rescind it on my part.”

In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying, “I rescind this contract.” — a total refusal to perform it, or something equivalent to that, which would enable the plaintiff on his side to say, “If you rescind the contract on your part, I will rescind it on mine.” That principle is laid down and very well enforced in a variety of cases which were cited, and which will be found in Smith’s Leading Cases, Vol. 2, in the note to the case of *Cutter v. Powell*. The same doctrine has been acted upon, originally, I believe, in the case of *Giles v. Edwards*,¹ and afterwards in the case of *Cooke v. Munstone*,² though with a different result. I take it to be clear, that, in order to entitle a person who has put money into the hands of another, to recover it back upon the ground that he has a right to treat the contract as rescinded, it must be made out clearly that the other party has rescinded the contract upon his part; otherwise the measure of damages is different. If a man puts money into the hands of another to purchase goods, and he neglects to do so, the proper measure of damages is the value of the goods, not the value of the money originally put into the defendant’s hands, which value of the goods may be a great deal less than the value of the money which has been put into his hands for the purpose of purchasing the goods; and it can only be where the defendant, who has received the money, has altogether refused to perform the contract on his part, — not merely delayed, but altogether refused, — so as to entitle the plaintiff to be in the same situation as if he had altogether rescinded the contract, that the plaintiff can have any right to rescind the contract, and bring an action for money had and received. Now,

¹ 7 T. R. 181.

² 1 N. R. 351.

on looking at the evidence in this case, it is clear that neither Mr. Anderson nor his partners at Bombay, for whom he is responsible, ever totally rescinded the contract. There is no evidence that they ever misapplied the money; for, though they may not have applied the precise identical proceeds of the goods which were received in the purchase of other bills, but applied them to their own use, the employment in this case is not of that strict nature, that the precise money which was received for the goods is to be expended in the purchase of bills, but the agent discharges his obligation if he employs an equivalent sum of money of his own. All that the evidence proves is, that, after the goods were sold in the month of August, the defendant and his partners did not perform their duty in applying the proceeds to the purchase of bills and remitting them to the plaintiff. It does not appear to us that this is at all an equivalent to an absolute rescission of the contract; and therefore, though they might be liable in a special action of assumpsit, in consideration that they had the plaintiff's consignment and his commission, in order to dispose, for his use, of the proceeds to be invested, and that they had neglected to do so, — though that action might have been maintained under the circumstances of this case, we are all of opinion that an action for money had and received will not lie. Therefore the result will be, that the rule for entering a nonsuit must be made absolute.

Rule absolute.

WRIGHT v. COLLS.

IN THE COMMON PLEAS, JUNE 25, 1849.

[*Reported in 8 Common Bench Reports, 150.*]

THIS was an action of assumpsit. The first count of the declaration stated, that, before the 29th of September, 1844, to wit, on the 26th of July, 1844, by a certain agreement in writing then made between the defendant of the one part, and the plaintiff of the other part, — after reciting that the defendant did, on a certain day then past, to wit, on the 25th of July then instant, as he was advised and believed, legally and effectually put an end to a certain lease granted by one James Esdaile to one Samuel Hammond the younger, and bearing date the 18th of July, 1839, of a certain farm called Hunt's Farm, by entry thereon under the power to him for that purpose contained in the said lease, by reason of the bankruptcy of the said Samuel Hammond the younger; and after further reciting that he, the defendant, had agreed to grant a lease of the said farm to the plaintiff, for twenty-one years from the 29th of September, 1844, at the same rents, and under the same terms as the same farm was then lately held by the said Samuel Hammond the younger, save and except of such part thereof as consisted of a certain cottage and premises in the said lease

mentioned to be in the occupation of one Edward Hook, upon the following terms and conditions : It was mutually agreed by and between the plaintiff and the defendant, that the defendant should grant, and the plaintiff should accept, a lease of all the said farm and land (except the cottage and premises in the said lease stated to be in the occupation of the said Edward Hook, and also except the timber, game, fish, and wild-fowl, and liberties, as in the said lease to the said Samuel Hammond the younger are excepted), at the yearly rent of 316*l.* 8*s.*, clear of all deductions, excepting land-tax, and payable quarterly ; the said lease so agreed to be granted and accepted as aforesaid, to commence on the said 29th of September, 1844, if the defendant could then legally make and execute the same, or so soon after as the defendant should be in a situation to grant the same : that it was thereby further agreed by and between the plaintiff and the defendant, that the said yearly rent should commence from the commencement of the term, or on possession being given, which should first happen, and should be paid quarterly ; that the plaintiff should pay such further rents as were provided for and reserved by the said lease to the said Samuel Hammond the younger ; and that the said lease so to be granted and accepted as aforesaid, should contain the same or the like covenants, provisos, conditions, and agreements as were contained in the said lease to the said Samuel Hammond the younger, and such further covenants and agreements as were usual, according to the custom of the country : that it was thereby further agreed by and between the plaintiff and the defendant, that the plaintiff should pay down to the defendant, on possession being delivered to him of the said farm thereby agreed to be demised to him, except the said cottage as aforesaid, the sum of 500*l.* as a bonus or premium for the said lease so to be granted and accepted as aforesaid, and also should pay all the costs, charges, and expenses of the said agreement, and a counterpart thereof, and should execute and deliver a counterpart of the said lease so to be granted and accepted as aforesaid, to the defendant, — the same agreement and lease and counterparts to be prepared by the solicitor of the defendant : and that it was further agreed by and between the plaintiff and the defendant that the plaintiff should not require, call for, or see, or investigate the title of the defendant : Mutual promises : Averment, that, after the making of the said promise of the defendant, and before the said 29th of September, 1844, to wit, on the 8th of August, 1844, possession of the said farm, etc. (except the said cottage as aforesaid), was delivered to the plaintiff under the said agreement ; and that, on such possession being delivered to him as aforesaid, he the plaintiff, relying on the said promise of the defendant, paid to the defendant, and the defendant then received of the plaintiff, a large sum of money, to wit, the sum of 250*l.* in part payment and satisfaction of the said sum of 500*l.* so agreed to be paid by the plaintiff to the defendant as a bonus or premium for the said lease as aforesaid ; and that, although he, the plaintiff, had always from the time of the making of the said agreement,

continually, been ready and willing to accept the said lease so agreed to be granted and accepted as aforesaid, and to execute and deliver a counterpart thereof to the defendant, according to the terms of the said agreement ; and although the said 29th of September, 1844, and a reasonable time for the defendant to grant the said lease so agreed to be granted as aforesaid, had elapsed before the commencement of the suit ; and although the defendant, on the said last-mentioned day, and from thence continually hitherto, was in a situation to grant, and could legally make and execute, such lease as last aforesaid, and during all the time aforesaid had notice of the said several premises thereinbefore mentioned ; yet that the defendant, disregarding his said promise, did not nor would, on the said 29th of September, 1844, or at any other time, though often requested so to do, grant to the plaintiff the said lease so agreed to be granted and accepted as aforesaid, but had wholly neglected and refused so to do ; and that thereby the plaintiff not only had lost and been deprived of the benefits and advantages of the said lease so agreed to be granted and accepted as aforesaid, and of divers large gains and profits, to wit, to the amount of 500*l.*, which would have accrued to him from the granting of the same, but had also lost and been deprived of the use of the said sum of money so paid by him to the defendant as aforesaid, in part payment and satisfaction of the said sum of 500*l.* so agreed to be paid as a bonus or premium for the said lease as aforesaid.

There was also a count for money had and received.

The defendant pleaded, — first, *non assumpsit* to both counts ; secondly, to the first count, that the plaintiff was not ready and willing to accept the lease ; thirdly, to the first count, that the plaintiff had not paid or offered to pay any part of the residue of the 500*l.* ; fourthly, to the first count, that the plaintiff had not, until the bringing of the action, been in a situation to grant, and could not legally grant, the lease ; fifthly, to the first count, that a reasonable time for granting the lease had not elapsed.

The cause was tried before COLERIDGE, J., at the Chelmsford spring assizes, 1848. The facts that appeared in evidence were as follows :— On the 18th of July, 1839, one James Esdaile granted to one Samuel Hammond the younger, a farm at Upminster, in the county of Essex, for twenty-one years : this lease contained a covenant on the part of Hammond not to assign without consent in writing ; and a power of re-entry was reserved to Esdaile in case of Hammond's bankruptcy or insolvency. After the grant of this lease, Esdaile conveyed his interest in the farm to Colls. In 1844, a fiat issued against Hammond, under which he was adjudged a bankrupt ; whereupon Colls re-entered, under the power reserved in the lease of the 18th of July, 1839, and, on the 26th of July, 1844, entered into an agreement to grant a lease of the farm to Wright. The agreement was as follows :—

“ Agreement made the 26th of July, 1844, between Christmas William Colls of the one part, and James Alfred Wright, of Brentwood, Essex,

gentleman, of the other part: Whereas the said C. W. Colls did, on the 25th of this instant July, as he is advised and believes, legally and effectually put an end to the lease granted by James Esdaile, Esq., to Samuel Hammond the younger, and bearing date the 18th of July, 1839, of Hunt's Farm, in Upminster, Essex, by entry thereon under the power to him for that purpose contained in the said lease, by reason of the bankruptcy of the said Samuel Hammond the younger, and he hath agreed to grant a lease thereof to the said J. A. Wright, for twenty-one years from the 29th of September, 1844, at the same rents and under the same terms as the same farm was lately held by the said Samuel Hammond, save and except such part thereof as consists of the cottage and premises in the said lease mentioned to be in the occupation of the said Edward Hook, — on the following terms and conditions: It is therefore hereby mutually agreed by and between the said C. W. Colls and J. A. Wright, that the said C. W. Colls shall grant, and the said J. A. Wright shall accept, a lease of all the said farm and land (except the cottage and premises in the said lease stated to be in the occupation of Edward Hook, and with such exception of timber, and of game, fish, and wild-fowl, and liberties, as in the said lease to the said Samuel Hammond are excepted), at the yearly rent of 31*l.* 8*s.*, clear of all deductions except land-tax, and payable quarterly. The lease to commence on the 29th of September next, if the said C. W. Colls can then legally make and execute a lease thereof, or as soon after as the said C. W. Colls shall be in a situation to grant a lease. The said yearly rent to commence from the commencement of the term, or on possession being given, which shall first happen, and to be paid quarterly. The said J. A. Wright also to pay such further rents as are provided for and reserved by the said lease to the said Samuel Hammond. The said lease to contain the same or the like covenants, provisos, conditions and agreements as are contained in the said lease to the said Samuel Hammond, and such further covenants and agreements as are usual, according to the custom of the country. The said J. A. Wright to pay down to the said C. W. Colls, on possession being delivered to him of the said farm hereby agreed to be demised to him (except the said cottage as aforesaid), the sum of 500*l.*, as a bonus or premium for the said lease; and also to pay all the costs, charges, and expenses of this agreement, and a counterpart thereof, and of the said lease, and of a counterpart thereof, and to execute and deliver a counterpart of such lease to the said C. W. Colls: the same agreement and lease and counterparts to be prepared by the solicitor of the said C. W. Colls. The said J. A. Wright is not to require, or to call for, or to see or investigate the title of the said C. W. Colls. The said J. A. Wright to take the growing crops at a valuation, to be made by two arbitrators, one to be named by each party, with power for those two arbitrators to name an umpire; the award of any two of them to be binding. And, in case either party shall refuse or neglect, for ten days, to name an arbitrator, after the other party

has named an arbitrator, then the arbitrator so named shall have power to name another arbitrator, and he and such arbitrator so named by him shall have liberty to name an umpire, if they cannot agree; and the award of any two of them to be binding. But, if the said C. W. Colls should not have legal right to sell the said crops, he is not to be bound so to do. Witness, the hands of the said parties," etc.

Under this agreement, the plaintiff was let into possession of the farm, which he occupied for two years, during which he duly paid the rent reserved, and also paid 250*l.* of the 500*l.* bonus. Hammond having presented a petition to the court of review, in January, 1845, obtained a *supersedeas* of the fiat against him; and in 1846 commenced an ejectionment to recover possession of the farm.

One Woodward, who was called as a witness on the part of the plaintiff, proved that the defendant had repeatedly declared to him that Hammond's lease was void, and good for nothing.

It also appeared, that, in September, 1844, a draft lease had been submitted by the defendant to the plaintiff's solicitor, and returned by him approved.

The only evidence of the issuing of a fiat against Hammond, was, the production of a *supersedeas*, which the learned judge ruled to be sufficient for that purpose.

As to the first issue, the learned judge merely left it to the jury to find what damages the plaintiff had sustained by the defendant's breach of contract. Upon the second issue, he directed the jury to find for the plaintiff, which they did: upon the third issue, he directed them to find for the defendant; they, however, found that issue for the plaintiff: upon the fourth issue, he directed a verdict for the plaintiff, — reserving leave to the defendant to move to enter the verdict on that issue for the defendant, if the court should think him so entitled: upon the fifth issue, he gave the jury no direction, and that issue they found for the plaintiff: and, as to the count for money had and received, the learned judge told the jury that the plaintiff was entitled to recover the 250*l.* which he had paid on account of the 500*l.* premium.

The jury thereupon assessed the damages on the first count at 50*l.* and on the second at 250*l.*

Shee, Serjt., in Easter term, 1848, obtained a rule *nisi* for a new trial, on the ground of misdirection, and that the assessment of damages upon the two counts was inconsistent; and also to arrest the judgment, on the ground that there was no averment in the declaration that the plaintiff tendered, or was ready and willing to pay, the 250*l.*, residue of the 500*l.*

Lush and *Hawkins*, in Hilary vacation, 1849, showed cause.

Shee, Serjt., and *Bramwell*, in support of the rule.

COLTMAN, J., now delivered the judgment of the court, — after stating the agreement and the pleadings, — as follows: —

The remaining question is, whether there is evidence to support the count for money had and received.¹ The agreement in this case was so far acted upon that the plaintiff was admitted into possession, and occupied the land for two years, and paid 250*l.* in part of the 500*l.*; and, it having turned out in the end that no lease could or would be granted to him, he claims to have the 250*l.* returned to him, as being paid on a consideration which has failed, — that consideration being, as the plaintiff alleges, the promised grant to him of a lease for twenty-one years. The defendant, on the other hand, contended that the consideration for paying the sum of 500*l.* was not solely the granting of the lease, but that the whole of the matters agreed to be done on the one side, was the consideration for the whole of the matters to be done on the other side. It may be admitted that such is in general the case, — that the whole of the stipulations on the one side are the consideration for the whole of the stipulations on the other: but such is not necessarily the case; nor is it the case, we think, in this agreement, which is of a special nature; and it is expressly stated in it that the sum in question is a bonus or premium for the lease, and the granting of the lease is the particular consideration for which the bonus was to be given.

It was understood between the parties that there might be some difficulty or delay in granting a valid lease; and therefore the parties contemplated the commencement of a tenancy before the lease was granted; and the yearly rent of 316*l.* 8*s.* was to commence, in that event, from the time when possession was delivered; and the sum of 500*l.* was then to be paid. But it cannot be supposed to have been the intention of the parties that the defendant should keep the sum of 500*l.*, if he never made the lease. The object of the tenant in making such an agreement is, that he may have a security that he shall keep the land for the specified term, so that he may safely lay out money in improvements at the commencement of his term, of which he may reap the benefit before his term is expired. He may reasonably be supposed to have been willing to pay an annual rent for the possession of the land, but not to be willing to pay the bonus or premium, unless he gets the security of the term; and therefore it is, that, in express terms, he states that the money is to be paid as a bonus for the lease, not as a consideration for making the agreement. The lease, then, not having been granted, the consideration must, after such a lapse of time, be considered to have failed, and the count for money had and received is maintainable.

Under this state of circumstances, the defendant is entitled to have the verdict entered for him on the fourth issue; and the verdict for the plaintiff on the other issues will stand.

Rule accordingly.

¹ Only so much of the opinion is given as relates to this question. — Ed.

GOODMAN v. POCKOCK.

IN THE QUEEN'S BENCH, JUNE 6, 1850.

[Reported in 15 Queen's Bench Reports, 576.]

INDEBITATUS ASSUMPSIT for work and labor, journeys, etc., money paid, and on an account stated. Pleas: 1. *Non assumpsit*. Issue thereon. 2. Payment. Replication, traversing the payment. Issue thereon.

On the trial, before ERLE, J., at the Middlesex sittings in Trinity term, 1849, it appeared that the defendant engaged the plaintiff as a commercial traveller, from 23d January, 1847, at a salary of 200*l.* a year payable quarterly, and dismissed him from that employment on the 8th April, 1848. The plaintiff then brought an action for the wrongful dismissal. The declaration in that action contained a special count for such dismissal, and also the common counts for work and labor, money paid, and on an account stated: the particulars delivered contained items for four quarters' salary up to 23d January, 1848, and 19*l.* 6*s.* 11*d.* for disbursements and expenses; they also gave credit for payments to the defendant, 168*l.* 1*s.* 9*d.*, and claimed a balance of 51*l.* 5*s.* 2*d.* On the trial of that action, before Lord DENMAN, C. J., at the Middlesex sittings after Hilary vacation, 1849, his Lordship expressed an opinion that the plaintiff could not recover for service actually rendered during the broken quarter after 23d January, 1848, because what might be due for such service was recoverable under the *indebitatus* count only, and was not included in the particulars. The jury thereupon gave damages for a portion of unpaid salary up to 23d January, and for disbursements and expenses (deducting payments allowed in the particulars, and others proved), and also 50*l.* for the wrongful dismissal, and stated that they had not taken into the account any service rendered between 23d January and the date of plaintiff's dismissal. The particulars in the present action claimed a ratable portion of salary for the broken quarter, and 5*l.* 6*s.* for disbursements and expenses during the same period. ERLE, J., was of opinion that, as the plaintiff by suing on the contract in the first action had treated the contract as still open, he could not now recover under the common count for work and labor, and that he was entitled to recover for money paid only. The jury gave their verdict accordingly; and leave was reserved to the plaintiff to move to increase the damages, if the court should be of opinion that damages were recoverable *pro rata* for the fraction of a quarter, under the common count for work and labor.

Humfrey, in Trinity term, 1849, obtained a rule *nisi* accordingly.

Knowles now showed cause.

Humfrey and *Barnard*, *contra*.

LORD CAMPBELL, C. J. I am extremely sorry if the plaintiff has sustained any hardship in consequence of the course which this litigation has taken: but we must decide this case according to the principles of law; and, according to those principles, I have not the slightest doubt that this action must fail as to the claim now in question. The plaintiff was hired for a year at wages payable quarterly; and in the middle of a quarter he was wrongfully dismissed. He might then have rescinded the contract, and have recovered *pro rata* on a *quantum meruit*.¹ But he did not do this; he sued on the special contract, and recovered damages for a breach of it. By this course he treated the contract as subsisting; and he recovered damages on that footing. It is said that he recovered in that action in respect of no services except those of the past quarters. I receive with profound respect the opinion which the illustrious judge who tried the former action is said to have expressed: but I have a clear opinion, and I must act upon it, that the jury in assessing damages for the wrongful dismissal ought to have taken into the account the plaintiff's salary up to the time of his dismissal. It is said there is now no plea to raise the point. The plea of *non assumpsit* is quite sufficient: it obliges the plaintiff to show a debt due; and that could be only by showing that work was done for which payment could be claimed under the common count. *Hartley v. Harman*² is a different case; the contract was, not for a year, but at the rate of so much per annum, the engagement to be terminated by a month's notice on either side; and the special count was for not giving the month's notice, and not for a wrongful dismissal: there was no question of service rendered for a broken quarter or for any other broken period: the service rendered was a complete performance of the contract; the contract was a completely executed contract so far as regarded the service. Under these circumstances it was rightly held that the plaintiff could not recover on the special count for his actual service, but that he should have had a common count as on an executed contract, and that he might set himself right by a second action.

PATTESON, J. I am not aware that this precise point has been raised in any case. In *Smith v. Hayward*³ money was paid into court, and in *Archard v. Hornor*⁴ there was a tender, enough in both cases to cover the service up to the time of dismissal; so that the question did not arise in either of those cases. *Hartley v. Harman*² was treated as a mere case of a month's notice or a month's wages: the contract said nothing about a month's wages, but it was so treated; so the dismissal was not wrongful:

¹ A folly may possibly lurk in the use of the word "rescission." It is perfectly true that a contract, as it is made by the joint will of the two parties, can only be rescinded by the joint will of the two parties; but we are dealing here not with the right of one party to rescind the contract, but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it. — BOWEN, L. J., in *Mersey Steel & Iron Co. v. Naylor*, 9 Q. B. Div. 648, 671. — Ed.

² 11 Ad. & E. 735.

³ 7 Ad. & E. 544.

⁴ 3 Car. & P. 349.

the only fault was the non-payment of a month's wages. The damages in such a case are liquidated; but, according to *Fewings v. Tisdal*¹ they cannot be recovered under an *indebitatus* count. Mr. Smith in the note, already cited, to *Cutter v. Powell*,² says, perhaps "the result of the authorities on this subject may be, that a clerk, servant, or agent, wrongfully dismissed, has his election of three remedies: viz., that, 1. He may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately." "2. He may wait till the termination of the period for which he was hired, and may then, perhaps, sue for his whole wages, in *indebitatus assumpsit*, relying on the doctrine of constructive service, *Gandell v. Pontigny*";³ "3. He may treat the contract as rescinded, and may immediately sue, on a *quantum meruit*, for the work he actually performed, *Planché v. Colburn*."⁴ I think Mr. Smith has very properly expressed himself with hesitation as to the second of the above propositions; it seems to me a doubtful point. The plaintiff in this case has selected two out of the three remedies suggested: he has sued specially on the contract for the wrongful dismissal, and also on the *quantum meruit* for his actual service, treating it as a rescinded contract. To bring *indebitatus assumpsit* he must rescind the contract. *Planché v. Colburn*,⁴ on which case principally we granted this rule, is not satisfactorily reported. There were two counts in the declaration; and it does not appear on which the verdict was taken. The defence appears to have been that the plaintiff had entered into a new contract; but the jury negatived that. TINDAL, C. J., says: "I agree that when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*: part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labor." The Lord Chief Justice, certainly, is reported as if he considered the plaintiff entitled to recover on the *quantum meruit*. It may be that the plaintiff was content to treat the contract as rescinded and take damages *pro rata*, which would bring the case within Mr. Smith's third proposition. The damages now claimed by the present plaintiff are only for the period of service during the broken quarter in which he was dismissed. In *Hartley v. Harman*⁵ all the service had passed into *indebitatus assumpsit*. Here the service for the broken quarter has not so passed. The plaintiff did not rescind the contract, but sued upon it; and the damages given to him in his special action must be taken to have been awarded to him in respect of the period subsequent to the last complete quarter which he served. I think this rule must be discharged.

COLERIDGE, J. In a case like this the servant may either treat the con-

¹ 1 Ex. 295.

² 2 Smith's L. C. 20.

³ 4 Campb. 375.

⁴ 8 Bing. 14.

⁵ 11 Ad. & E. 798.

tract as rescinded and bring *indebitatus assumpsit*, or he may sue on the contract; but he cannot do both; and, if he has two counts, he must take the verdict on one only. Here the plaintiff elected to sue on the contract; and he cannot now sue in this form.

ERLE, J. I am of the same opinion. The plaintiff had the option either to treat the contract as rescinded, and to sue for his actual service, or to sue on the contract for the wrongful dismissal. He chose the latter course; and he cannot now turn round and try the former course. As to the other option referred to by Mr. Smith, I think that the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages on the ground of a constructive service after dismissal. I think the true measure of damages is the loss sustained at the time of the dismissal. The servant, after dismissal, may and ought to make the best of his time; and he may have an opportunity of turning it to advantage. I should not say anything that might seem to be a doubt of Mr. Smith's very learned note, if my opinion on this point were not fortified by the authority of the Court of Exchequer Chamber in *Elderton v. Emmens*.¹

*Rule discharged.*²

PRICKETT v. BADGER.

IN THE COMMON PLEAS, NOVEMBER 20, 1856.

[*Reported in 1 Common Bench Reports, New Series, 295.*]

THIS was an action for work and labor, and for money alleged to be due upon an account stated. Plea, never indebted. The writ was issued on the 4th of June, 1856.

The particulars of demand were as follows: —

To attending you in Southampton Buildings, receiving instructions to dispose of by private contract about 14 acres of freehold land in the Seven Sisters Road, Holloway, Middlesex, at 650*l.* per acre; meeting you on the ground, when you pointed out the same; making plan to a large scale; attending applicants with particulars and terms; and ultimately forwarding you an offer that we had received of 700*l.* per acre, — commission, as agreed, at 1*l.* 10*s.* per cent £143 5 0

THE cause was tried before the LORD CHIEF BARON, at the last assizes at Guildford. The facts were as follows: The plaintiff was a house and estate agent. The defendant is lord of the manor of Highbury. In the month of July, 1852, the defendant called upon the plaintiff, and, according to the plaintiff's evidence, representing that he had an interest in a

¹ 4 C. B. 180.

² When a contract has been so far performed as to leave only a simple debt between the parties, *indebitatus assumpsit* will lie. *Stone v. Rogers*, 2 M. & W. 443. — Ed.

piece of land containing about fourteen acres, parcel of the manor, proposed to the plaintiff to look out for a purchaser at the price of about 650*l.* per acre. The plaintiff agreed to do so, at the same time telling the defendant that his terms would be a commission of $1\frac{1}{2}$ per cent upon the amount of purchase-money. The plaintiff immediately set about preparing a plan and advertisement; wrote letters to and had communications with several persons, and ultimately, in November in that year, received an offer of 675*l.* per acre from the Birkbeck Land Society. The defendant then for the first time informed the plaintiff that he had no interest in the land, but that it belonged to one Wagstaffe; and Wagstaffe at first stated that he himself had not completed the purchase of the land, and afterwards declined to sell it to the Birkbeck Land Society: and, in January, 1853, the plaintiff was desired by Wagstaffe to take no further steps in the matter. On cross-examination, the plaintiff admitted that he had been informed by Wagstaffe in September, 1852, that he had an interest in the land, and that it could not be sold without him.

At the close of the plaintiff's case, it was submitted on the part of the defendant that the action was wrong in form; for that the plaintiff's own evidence showed that the only contract (if any) between the parties was a special contract for a commission of $1\frac{1}{2}$ per cent on his accomplishing a sale of the land, as stated in the particulars; and that the action should have been a special action for wrongfully withdrawing the authority to sell.

The LORD CHIEF BARON overruled the objection, — holding that it was competent to the plaintiff to sue upon a *quantum meruit*; and he likened the case to that of a man, who having a house which he is desirous of letting or selling, places it in the hands of several house-agents; in which case, he said, that, though the successful agent alone would be entitled to claim commission, the others would clearly be entitled to something for their trouble.

The defendant and Wagstaffe were then called. The former stated, that, though he had told the plaintiff that the land in question was for sale at about 600*l.* or 700*l.* per acre, he never asserted that it was his, or that he had any interest in it, and never employed him to offer it for sale; that the land had never been sold; and that no demand in respect of commission or otherwise was ever made upon him by the plaintiff until the year 1855. And Wagstaffe stated that neither the plaintiff nor any one else had any authority from him to offer the land for sale.

In leaving the case to the jury, the LORD CHIEF BARON told them, that, though the plaintiff was not, under the circumstances, entitled to the $1\frac{1}{2}$ per cent commission, he was still entitled to recover a reasonable remuneration for his services.

The jury returned a verdict for the plaintiff, damages 50*l.*; and his Lordship directed the judgment and execution to be stayed until the fifth day of the ensuing term.

Montagu Chambers, Q. C., on the former day in this term, obtained a rule *nisi* for a new trial on the ground of misdirection, and also that the verdict was against the evidence.

Shor, Serjt., and *Hawkins* on a subsequent day showed cause.

Montagu Chambers, Q. C., and *Hance* in support of the rule.

WILLIAMS, J.¹ I am of opinion that there was no misdirection in this case. But I think there was evidence which was fit for the consideration of the jury, that the defendant employed the plaintiff to sell the land, upon the terms, that, if he found a purchaser at the price named, he was to receive a commission of $1\frac{1}{2}$ per cent; and that the plaintiff bestowed his labor in endeavoring to find, and did find, a purchaser at that price; but that the negotiation failed because the defendant was not prepared to come forward as vendor; and that so the plaintiff was prevented from earning the stipulated commission. If the jury believe these facts to be established, then, according to *Planché v. Colburn*,² and other authorities in conformity therewith, the plaintiff was entitled to abandon the special contract, and resort to an action founded upon the promise which the law would infer from such a state of facts. That was evidently the view taken by the LORD CHIEF BARON at the trial. It has been contended that that is erroneous, and that it should have been left to the jury to say whether there was any such implied contract. I think it was not a question for the jury at all. It is true that the Court of Exchequer in *De Bernardy v. Harding*,³ appears to have treated it as a matter for the consideration of the jury; but the decision there is quite consistent with *Planché v. Colburn*, and ALDERSON, B., distinctly states and approves of the principle of that case. For these reasons, I am of opinion that the direction of the LORD CHIEF BARON was quite right, and that there was nothing to leave to the jury. I am anxious it should not be supposed that the court intends to lay it down as a general rule, that, where an agent is employed to sell property, and his authority is revoked before anything has been done under it, he is at liberty to resort to the common counts for his work and labor in endeavoring to find a purchaser. In such a case, nothing more appearing, if the plaintiff attempted to rely on the *quantum meruit*, he would probably be met by the implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but, if not, then he is to get nothing. But no such answer was or could be set up here, because the plaintiff had actually succeeded in finding a person who was willing to become a purchaser at a price exceeding the price demanded, and was only prevented from carrying out the negotiation by the defendant's inability to convey. With regard to the second branch of the rule, as the LORD CHIEF BARON has expressed himself not satisfied with the verdict, the cause must go down again, the costs to abide the event.

¹ CRESSWELL, J., had gone to Chambers.

² 8 Bing. 14; 1 Moo. & S., 51.

³ 5 Ex. 822.

CROWDER, J. I also think there was no misdirection in this case. The defendant having declined, from whatever cause, to sell the land after the plaintiff had succeeded in procuring a purchaser willing to take it at the price proposed, and the plaintiff having thus done all he could to entitle him to the stipulated commission, the LORD CHIEF BARON ruled, that, although the plaintiff could not maintain an action upon the special contract, he was nevertheless entitled to recover upon the common count a reasonable remuneration for his work and labor. In this I am of opinion he was quite right. His ruling is perfectly consistent with the law as laid down in the notes to the case of *Cutter v. Powell*, in 2 Smith's Leading Cases, 1. At p. 16, the learned editors say, — "It is an invariably true proposition, that wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit* for anything which he had done under it previously to the rescission: this, it is apprehended, is established by *Withers v. Reynolds*,¹ *Planché v. Colburn*,² *Franklin v. Miller*,³ and other cases." Again, at p. 31, it is said, — "It being, therefore, established that, where one contractor has absolutely refused to perform, or rendered himself incapable of performing, his part of the contract, the other contractor may, if he please, rescind; such act or such refusal being equivalent to a consent to the rescission: the remaining part of the proposition above stated is, that, upon such a rescission he has a right, if he have done anything under the contract, to sue immediately for compensation on a *quantum meruit*. That he should do so, is consistent with reason and justice; for, it is clear that the defendant cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done, by his own tortious refusal to perform his part of the contract, which refusal alone has enabled the plaintiff to rescind it. He cannot, however, recover on the special contract, and must therefore be entitled to sue upon a *quantum meruit*, founded on a promise implied by law on the part of the defendant to remunerate him for what he has done at his request; and, as an action on a *quantum meruit* is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may of course bring his action immediately. This point is decided by *Planché v. Colburn*." It is insisted on the present occasion, that the LORD CHIEF BARON should have left it to the jury, whether under the circumstances a contract for reasonable remuneration was to be implied. It seems to me, however, that that is a question of law, and not a question for the jury. It would be idle to put it to the jury to imply what of necessity they must imply. In *De Bernardy v. Harding*, it is true, something is said by ALDERSON, B., as to leaving it to the jury; but the decision does not turn on that. Here it seems to me, that, under the circumstances proved, a con-

¹ 2 B. & Ad. 882.² 8 Bing. 14; 1 Moo. & S. 51.³ 4 Ad. & E. 599.

tract was implied by law to pay the plaintiff a reasonable remuneration for his labor, and consequently the direction was correct. I agree with my brother WILLIAMS that the ordinary rule as to employing an agent to let or to sell for a certain commission, where the authority is revoked before anything has been done under it, does not apply to the present case. As, however, the learned judge who tried the cause is dissatisfied with the result, it must go down again.

WILLES, J. I am of the same opinion. The form in which the objection was presented at the trial, was, that the declaration should have been framed specially for a wrongful withdrawal of the authority to sell. That, however, is an erroneous notion. There are many instances in the books which might be cited to show that, under circumstances like these, the plaintiff may maintain an action upon the money counts. In the case of goods shipped from abroad, to be paid for in three months from arrival, under ordinary circumstances the goods must be paid for though they never arrive : but, if the shipper by his wrongful act prevents their arrival, the buyer is not bound to pay for them. I entirely agree with my learned Brothers as to the substance of the case. It is quite clear that the plaintiff was entitled to some remuneration. In pursuance of the retainer, he proceeded to find a purchaser for the land ; and it was only the defendant's disinclination or inability to proceed that prevented the sale being completed. The plaintiff would have been entitled to receive the commission agreed on, if the defendant's conduct had not prevented his earning it. I must confess I do not see why the jury should not have given him the full amount. The learned judge being dissatisfied with the verdict, there must be a new trial, upon the terms suggested.

Rule absolute for a new trial, the costs to abide the event.

BARTHOLOMEW AND OTHERS v. MARKWICK.

IN THE COMMON PLEAS, JANUARY 11, 1864.

[*Reported in 15 Common Bench Reports, New Series, 711.*]

THIS was an action for goods sold and delivered. Plea, never indebted.

At the trial before KEATING, J., at the sittings at Westminster after last Trinity term, it appeared that the action was brought to recover the price of certain furniture supplied to an hotel which the defendant was about to open in Hanover Square ; the terms on which the goods were sold being, present payment of one-half in cash, the remainder by bill at six months. The first portion of the goods — which amounted to 88*l.* 17*s.*, after deducting for certain articles not in accordance with the order — was sent on or about the 3d of April, 1863. The whole supply contemplated would amount to between 600*l.* and 700*l.* The plaintiffs requiring payment or

security for the goods already sent, before supplying any more, the defendant on the 17th of April wrote to them as follows:—

GENTLEMEN,—The way you do your business will not suit me. I have an account for a large amount of goods not purchased, and a demand made for payment, opposed to treaty. Your salesman well knows my terms: and I now close all further orders, and desire what I have not purchased may be taken off my premises. I will not be responsible for them against damage.

MARK MARKWICK.

I shall settle your amount upon the terms agreed, when corrected. I can but regret my recommendation.

Some further communication took place between the parties; and, on the 21st of April, the defendant wrote to the plaintiffs, as follows:—

GENTLEMEN,—I am surprised at what I have heard, that you demand security for further orders. You will give me cause for this fairly. When you have done so, or upon your doing so, I am ready to close my account upon the terms agreed upon and this day assented to by you. I am willing also to carry out my order in good faith, [stating certain particulars], and pay also when delivered, upon the same terms as agreed. As to my position, I know it, and what is in my possession in property, and which in three or four months is coming to me. I have no desire to have goods refused to me; but I can do without them. I leave you to carry out in good faith, after reference had from a man of the highest standing; and I desire to know, as is fair to me, what is said of me.

MARK MARKWICK.

On the part of the defendant it was objected that the plaintiffs should have declared upon the special contract, and could not recover on the count for goods sold and delivered, at all events until after the expiration of the six months' credit; and for this was cited Chitty on Contracts, 6th Ed. 390.

For the plaintiffs it was submitted that the defendant's letters amounted to a rescission or repudiation of the special contract, and that consequently the plaintiffs were entitled to sue for goods sold; and the following passage from the notes to *Cutter v. Powell*,¹ was relied on,—“It is an invariably true proposition, that, wherever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit* for anything which he has done under it previously to the rescission: this, it is apprehended, is established by *Withers v. Reynolds*,² *Planché v. Colburn*,³ *Franklin v. Miller*,⁴ and other cases.”

¹ 2 Smith's L. C. 4th Ed. 15.

² 2 B. & Ad. 882.

³ 8 Bing. 14; 1 Moo. & S. 51.

⁴ 4 Ad. & E. 599.

The learned judge proposed to allow the plaintiffs to amend their declaration; but they declined to avail themselves of the permission. He then told the jury, that, if they thought the defendant had refused to pay the moiety in cash and to give a bill at the stipulated date for the residue, that would amount to a rescission of the contract, and entitle the plaintiffs to sue on a *quantum meruit*.

The jury returned a verdict for the plaintiffs, damages 88*l.* 17*s.*

Coleridge, Q. C., in Michaelmas term last, obtained a rule *nisi* for a new trial, on the ground of misdirection. — He referred to Chitty on Contracts,¹ and to the case of *Paul v. Dod*.²

O'Brien, Serjt., and *H. Matthews* showed cause.

Coleridge, Q. C., and *Griffiths*, in support of the rule.

ERLE, C. J. I am of opinion that this rule should be discharged. The action is brought for goods sold and delivered. It appears that the plaintiffs and defendant early in April last entered into a treaty for the sale and delivery of a large quantity of furniture, which the defendant was to pay for half in cash and half by bill at six months. Under this contract, certain goods were delivered, some of which, to the value of 88*l.* 17*s.*, were retained by the defendant. Disputes then arose between the parties, and on the 17th of April the defendant wrote a letter, in which he says, — “The way you do your business will not suit me. I have an account for a large amount of goods not purchased, and a demand made for payment, opposed to treaty. I now close all further orders, and desire what I have not purchased may be taken off my premises.” Neither cash nor bill was given for the goods kept. No doubt, the plaintiffs could have maintained an action upon the special contract, if the contract had remained open; and for the purposes of this case it is conceded that he could not have sued for goods sold and delivered. But it appears to me that the defendant’s letter amounted to a putting an end to the contract, and that the plaintiffs had a right to treat it as rescinded, and to sue for the fair value of the goods which had been delivered and kept. The authorities as to what will amount to such a rescission of a contract as to entitle the plaintiff to sue upon a *quantum meruit*, were very much discussed during my time in the Court of Queen’s Bench, in the case of *Hochster v. De la Tour*,³ and in some subsequent cases.⁴ Those authorities, I think, warrant us in holding that the plaintiff was entitled to treat the contract as rescinded, and to sue for goods sold and delivered.

This rest of the court concurring.

Rule discharged.

¹ 6th Ed. 390.

² 2 C. B. 860.

³ 2 Ellis & B. 678.

⁴ See *Avery v. Bowden*, 5 Ellis & B. 714, in error, 6 Ellis & B. 953; and *Reid v. Hoskins*, 5 Ellis & B. 729, in error, 6 Ellis & B. 953.

JAMES WEAVER v. ELIJAH BENTLEY.

IN THE SUPREME COURT OF THE STATE OF NEW YORK, MAY, 1803.

[Reported in 1 *Caines*, 47.]

THIS was an action of assumpsit to recover back the consideration paid on an agreement under seal in the following words : " November the 26th, 1796. Know all men by these presents, that I, Elijah Bentley, do bind myself to procure for James Weaver, lot No. 67, joining Balcock's on the west, which lot I am now in possession of, which I promise to procure so far as this, on these conditions, that is, a lease to be either three years rent free, then to pay the interest of one hundred and sixty pounds yearly, for the term of ten years, then with paying one hundred and sixty pounds, to have a deed for the same lot, containing one hundred acres, which lease I promise to deliver by the first day of June next, and then if not called for, whenever called for. The condition of this obligation is such, that if I do not deliver the said lease, the two sixty pound notes, which are dated November the 26th, 1796, which I have against James Weaver, shall be of none effect. As witness my hand and seal.

ELIJAH BENTLEY. (L.S.)."

On the trial of this cause before Mr. Justice THOMPSON, at the Circuit Court for the county of Herkimer, the plaintiff produced in evidence the agreement and affidavits of various payments by the plaintiff.

The counsel for the defendant objected to the plaintiff's right of recovering in this form of action ; insisting that the agreement was under seal, and imported a covenant, and therefore assumpsit would not lie ; but the judge, after argument, directed a verdict to be taken for the plaintiff, subject to the opinion of the court on the point relied on by the defendant.

KENT, J., delivered the opinion of the court. The defendant covenanted to procure for the plaintiff within a given time, or on demand thereafter, a lease for certain lands, three years free of rent, then to pay the interest of 160*l.* annually, for ten years, in lieu of rent, and at the expiration of that period, to have a conveyance of the fee on payment of the principal sum ; in default whereof, two notes of sixty pounds each, given by the plaintiff to the defendant, were to be void.

The plaintiff made certain payments in money and farm stock to the defendant, who failed to perform his covenant, and the plaintiff thereupon brought assumpsit ; and the question now is, whether the action will lie, or the plaintiff be compelled to resort to his covenant.

This case is so loosely drawn that it scarcely affords sufficient ground for a decision. It is not stated for what the notes, money, or stock were given ;

presuming them to have been the consideration of the covenant, the question then will be, whether the defendant having failed to perform on his part, the plaintiff may disaffirm the contract and resort to his assumpsit to recover back what he had paid. We are of opinion he had his election either to proceed on the covenant, and recover damages for the breach, or to disaffirm the contract, and bring assumpsit to recover back what he had paid on a consideration which had failed. Judgment, therefore, must be for the plaintiff.

LEWIS, C. J., RADCLIFFE, J., and THOMPSON, J., concurred.

LIVINGSTON, J. Two questions were submitted to us in this case.

1. Do the terms of the contract import a covenant?

2. Can the plaintiff waive covenant, and bring assumpsit to recover the consideration paid for the land?

In answer to the first it is only necessary to state, that the defendant "binds himself" under seal to procure for the plaintiff a certain lot of land, and "promises" to deliver the lease by a certain day. The words "bind and promise" create a covenant as strong as any which could have been used.

It follows, then, that an action of covenant will lie on the instrument on Bentley's non-performance, to recover back all that has been paid. When that is the case the party must rely on the security he has taken, there being no necessity for the law to imply a promise different from the one contained in the terms of the contract. Promises in law exist only where there is no express stipulation between the parties; thus in 2 T. R. 100, where a surety had taken a bond of indemnity from his principal, he was not permitted to resort to an action of assumpsit for the money he had paid. This is a stronger case, for if the present suit be maintainable for the money paid in consequence of this covenant, I see nothing to prevent the plaintiff from bringing an action on the instrument itself, for other damages which may have been sustained by the defendant's non-performance, and thus subjecting him to two suits for a compensation which might have been obtained in one; for these reasons I think it more safe to adhere to the rule which confines a man to the security he has taken, than to depart from it, merely because the merits may be with the plaintiff. The case of *D'Utricht v. Melchor*,¹ cannot be law. In my opinion there should be judgment for the defendant.

Judgment for the plaintiff.

¹ 1 Dall. 428.

JOHN DERBY AND OTHERS v. FREDERICK A. JOHNSON
AND OTHERS.

IN THE SUPREME COURT OF VERMONT, DECEMBER TERM, 1848.

[Reported in 21 Vermont Reports, 17.]

BOOK ACCOUNT. Judgment to account was rendered, and an auditor was appointed, who reported the facts substantially as follows:—

On the 16th day of March, 1846, the plaintiffs and defendants entered into a written agreement, by which the plaintiffs agreed to perform in the most substantial and workmanlike manner, to the acceptance of the engineer of the Vermont Central Railroad Company, all the stone work, masonry, and blasting on the three miles of railroad taken by the defendants, at certain specified prices by the cubic yard. On the 23d day of March, 1846, the plaintiffs commenced work under the contract, and continued until the 23d day of April, 1846, when the defendant Johnson directed and requested the plaintiffs to cease labor and to abandon the farther execution of the contract. In consequence of this request and direction the plaintiffs immediately, on the same day, ceased laboring under the contract and abandoned its farther execution. In the afternoon of the same day, and after the men and teams of the plaintiffs had been taken from the work in pursuance of this notice and request of the defendants, the defendants did advise, or request, the plaintiffs to do something more to a culvert, which was partly finished, and which had been that day condemned by the engineer, so that thereby a part of the culvert might be taken into the estimate of work done, which was to be made by the engineer the next day; but the plaintiffs declined so doing. From the nature of the work, and its unfinished state, at the time the work was discontinued, the value of a very considerable portion of the work performed could not be estimated by the prices specified in the contract.

The plaintiffs presented an account of the number of days' labor expended by themselves and the men in their employ, and of the materials furnished by them, in the prosecution of the work performed by them under the contract, amounting in the whole to \$313.44; and the auditor found, that the items were reasonably and properly charged. The defendants presented an account in offset, which was allowed at \$15.54.

Upon these facts the auditor submitted to the court the question, whether the plaintiffs were entitled to recover, and, if so, what amount.

The County Court, March term, 1848, BENNETT, J., presiding, rendered judgment for the plaintiffs for the amount of their account, as claimed by them, deducting the amount of the defendants' account. Exceptions by defendants.

Platt and Peck for defendants.

A. B. Maynard and Wm. P. Briggs for plaintiffs.

The opinion of the court was delivered by

HALL, J. It is insisted, in behalf of the defendants, that the request and direction of the defendants to the plaintiffs to cease work and abandon the execution of the contract, is to be considered in the light of a proposition to the plaintiffs, which they were at liberty to accede to, or disregard, and that, having acquiesced in it by quitting the work, the contract is to be treated as having been relinquished by the mutual consent of the parties. But we do not look upon it in that light. The direction of the defendants to the plaintiffs to quit the work was positive and unequivocal; and we do not think the plaintiffs were at liberty to disregard it. In *Clark v. Marsiglia*,¹ it was held, that the employer, in a contract for labor, had the power to stop the completion of it, if he chose, — subjecting himself thereby to the consequences of a violation of his contract; and that the workman, after notice to quit work, had not the right to continue his labor and claim pay for it. And this seems to be reasonable. For otherwise the employer might be entirely ruined, by being compelled to pay for work, which an unexpected change of circumstances, after the employment, would render of no value to him. If, for instance, in this case the location of the railroad had been changed from the place where the work was contracted to be done, or if the plaintiffs' employers had become wholly insolvent after the making of the contract, the injury to them, if they had no power to stop the work, might be immense and altogether without remedy. Rather than an injury so greatly disproportioned to that which could possibly befall the workman should be inflicted on the employers, it seems better to allow them to stop the work, taking upon themselves, of course, all the consequences of such a breach of their contract. Such, we think, is and ought to be the law. We are therefore satisfied, that the plaintiffs were prevented from executing their contract by the act of the defendants, and that the contract is not to be treated as having been mutually relinquished.

Treating the plaintiffs as having been prevented from executing their part of the contract by the act of the defendants, we think the plaintiffs are entitled to recover, as upon a *quantum meruit*, the value of the services they had performed under it, without reference to the rate of compensation specified in the contract. They might doubtless have claimed the stipulated compensation, and have introduced the contract as evidence of the defendants' admission of the value of the services. And they might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding; and they might well do so; for it doubtless continued binding on the de-

¹ 1 Denio, 317.

fendants. But we think the plaintiffs, upon the facts stated in the report of the auditor, were at liberty to consider the contract as having been rescinded from the beginning, and to claim for the services they had performed, without reference to its terms.

The defendants, by their voluntary act, put a stop to the execution of the work, when but a fractional part of that which had been contracted for had been done, and while a large portion of that which had been entered upon was in such an unfinished condition, as to be incapable of being measured and its price ascertained by the rate specified in the contract. Under these circumstances, we think the defendants have no right to say, that the contract, which they have thus repudiated, shall still subsist for the purpose of defeating a recovery by the plaintiffs of the actual amount of labor and materials they have expended.

In *Tyson v. Doe*,¹ where the defendant, after the part performance of a contract for delivering certain articles of iron castings, prevented the plaintiff from farther performing it, the contract was held to be so far rescinded by the defendant, as to allow the plaintiff to sustain an action on book for the articles delivered under it, although the time of credit for the articles, by the terms of the contract, had not expired. The court, in that case, say, "that to allow the defendant to insist on the stipulation in regard to the time of payment, while he repudiates the others, would be to enforce a different contract from that which the parties entered into." The claim now made in behalf of the defendants, that the rate of compensation specified in the contract should be the only rule of recovery, would, if sustained, impose upon the plaintiffs a contract which they never made. They did, indeed, agree to do all the work of a certain description on three miles of road, at a certain rate of compensation per cubic yard; but they did not agree to make all their preparations and do but a sixteenth part of the work at that rate; and it is not to be presumed they would have made any such agreement. We are not therefore disposed to enforce such an agreement against them.

The case of *Koon v. Greenman*,² is much relied upon by the counsel for the defendants. In that case the plaintiff had contracted to do certain mason work at stipulated prices, the defendant finding the materials. After a part of the work had been done, the defendant neglecting to furnish materials for the residue, the plaintiff quit work and brought his action of general assumpsit. The court held he was not entitled to recover the value of the work, but only according to the rate specified. The justice of the decision is not very apparent; and it does not appear to be sustained by the authorities cited in the opinion,—they being all cases, either of deviations from the contract in the manner of the work, or delays of performance in point of time. But that case, if it be sound law, is distinguishable from this in at least two important particulars. In that case the plaintiff

¹ 15 Vt. 571.

² 7 Wend. 121.

was prevented from completing his contract by the mere negligence of the defendant; in this, by his voluntary and positive command. In that case there does not appear to have been any difficulty in ascertaining the amount to which the plaintiff would be entitled, according to the rates specified in the contract; whereas in this, it is altogether impracticable to ascertain what sum would be due the plaintiffs, at the stipulated prices, for the reason that when the work was stopped by the defendants, a large portion of it was in such an unfinished state as to be incapable of measurement. That case is therefore no authority against the views we have already taken.

The judgment of the County Court is therefore affirmed.

DOOLITTLE & CHAMBERLAIN v. EDWARD McCULLOUGH.

IN THE SUPREME COURT OF OHIO, DECEMBER TERM, 1861.

[*Reported in 12 Ohio State Reports, 360.*]

ERROR to the District Court of Hamilton County.

The original action was assumpsit brought in the Commercial Court of Cincinnati, by McCullough, upon the common counts for work and labor done for Doolittle & Chamberlain, at their request. Plea, the general issue.

The cause was transferred from the Commercial Court of Cincinnati to the Court of Common Pleas of Hamilton County, and was thence appealed to the District Court by Doolittle & Chamberlain.

Upon the trial in the District Court, McCullough, the plaintiff, gave evidence tending to show that he did work for the defendants, in grading and excavating, upon a section of the Cincinnati, Hamilton, and Dayton Railroad, near Cincinnati, which section the defendants had undertaken to construct for the railroad company; that he did the work at the instance of the defendants; and that it was worth from eighteen to twenty cents per cubic yard, amounting to over two thousand dollars.

The defendants gave evidence showing that they, as contractors, had undertaken in a special written contract with the railroad company to construct said section with other sections of the railroad; and that, at the instance of the plaintiff, they entered into a special written contract with him on the 12th day of April, 1850, by which the plaintiff agreed to perform the work at the times and in the manner therein specified, and the defendants agreed to pay, and the plaintiff receive in full satisfaction therefor, the sum of eleven cents per cubic yard; to be estimated from time to time during the progress of the work by the engineers of the company, as particularly specified in the contract, and that all of the work done by the

plaintiff had been performed and measured and paid for under the contract and at the price named therein, and that the defendants had overpaid him some \$300, on the 15th of November, 1850, when the plaintiff abandoned the work before he had half completed his job.

McCullough, to rebut the proof so made by the defendants, gave evidence tending to show that one Bates, the agent of the defendants, had, with the knowledge and permission of the defendants, improperly interfered with, and produced discontent and dissatisfaction among the hands of the plaintiff, and induced them to leave the work, and so prevented the plaintiff from performing the job according to the terms of the contract, or in any other manner; and insisted that the defendants had thereby terminated the contract.

Different witnesses testified to the value of the work done by the plaintiff, and differed somewhat in their estimates of its cost. The witnesses generally concurred in their estimate of what would be the cost of the unfinished work embraced in the plaintiff's contract.

S. S. L'Hommedien, the president of the railroad company, testified that he was acquainted with the work done by the plaintiff for the defendants, and also with that part of the work included in his contract, but left unfinished by the plaintiff; that he regarded the upper three feet of the grading done by the plaintiff worth ten cents per cubic yard; that so much of the grading remaining to be done, when the plaintiff ceased working, as contained hard-pan, was worth three times as much per yard as what had been done; that to take the job through, altogether, it was worth from twenty-five to thirty cents per cubic yard to do the work as required by the contract.

The engineers who measured the work gave testimony to the same effect, and say the job was a very hard one for the plaintiff, at the contract price; and there was no evidence to the contrary introduced by either party. The plaintiff claimed, and the defendants did not deny, and all the proof showed that the work could not be done at the price stipulated in the contract, without loss to the plaintiff.

It was insisted, on behalf of the plaintiff, that the contract was put an end to, on the part of the defendants, by the intermeddling and improper talk and conduct of Bates, their general superintendent, with the workmen and hands of the plaintiff, whereby they were made dissatisfied and were induced to quit work for him.

Upon this point, the proof tended to show that the plaintiff, while prosecuting the job, became embarrassed and unable to pay his hands; that considerable excitement and discontent arose among them; that Bates, the agent of defendants, made a proposition to the plaintiff, if he could not go on with the job, to give up his contract to the defendants, and to sell to them his shanties, tools, etc., prepared along the line of the job, and in that way raise money to pay off his hands. The plaintiff insisted that the hands

were thereby made discontented, and induced to leave his employ; but this was denied by the defendants, and they also denied that they were responsible for what Bates said or did.

The court instructed the jury as follows:—

“If the jury believe that the contract was terminated by the defendants, against the consent of the plaintiff, the latter will not be confined to the contract price, but he may, in this action, recover what the work done is actually worth.” To this charge of the court the defendants excepted; and asked the court to charge the jury:—

“1. That, under no circumstances, can the plaintiff recover more than the actual value of the work shown to have been done.

“2. That the terms and conditions of the contract are binding and obligatory upon the parties, and that, by the terms of the contract, before the plaintiff was entitled to demand pay for work done under the contract, from the defendants, he was bound to have his work estimated by the chief, or assistant engineer, and the estimate so made, if any was exhibited, is binding on the parties, provided that estimate was honestly made by the engineer.

“3. That an estimate made by any person, not an engineer on the Cincinnati, Hamilton, & Dayton Railroad, is not the evidence the parties agree to receive, and cannot control the estimate made by the engineer whose estimate is required in the contract.

“4. If they find that the work was done under the written contract, given in evidence by the defendants, then, even if the contract was mutually agreed to be abandoned, in the middle of November, 1850, the plaintiff can only recover for the actual amount of work done, at the contract price, up to that time, from which is to be deducted the amount of payments made.”

All, except the first of these propositions, the court refused to give in charge to the jury; to which refusal the defendants excepted.

The verdict was for the plaintiff for \$755.35.

The defendants thereupon filed their motion for a new trial, on the following grounds:—

1. The verdict is contrary to evidence.

2. The court erred in the instruction given to the jury; and in refusing to instruct the jury as requested by the defendants.

The court overruled this motion and entered judgment on the verdict, and the defendants excepted, and to reverse that judgment filed a petition in error in this court, insisting that the District Court erred:—

1. In its charge to the jury, and in refusing to charge as requested by the defendants.

2. In overruling their motion for a new trial.

For and *For* for plaintiffs in error.

King, *Anderson*, and *Sage* for defendant in error.

SUTLIFF, J. The evidence is voluminous, and it might be difficult for us to determine, from the record, whether or not it warranted the conclusion to which the jury must have arrived, not only that the conduct of Bates toward the workmen of the plaintiff was improper, and induced them to leave the work, but also, that the defendants were accountable for such conduct, from the fact that Bates was at the time their employee.

We have no difficulty, however, in coming to a conclusion in relation to the first assignment of error.

The defendants below requested the court to instruct the jury, that if they found the work to have been done under the written contract, previous to the abandonment of the contract by the parties in November, 1850, that the plaintiff could only recover for the actual amount of the work then done, at the contract price. The court refused to so instruct the jury, but instructed them that, if they believed the contract was terminated by the defendants, against the consent of the plaintiff, he would not be confined to the contract price, but might, in the action, recover what the work done was actually worth.

We regard the exception to the charge of the court as having respect particularly to this part of the charge; and to this point our attention has been more particularly given.

What, then, is the rule of damages, in an action brought upon a cause of action arising under a contract terminated by the other party against the will of the party bringing the action? And is it true, that the price of services rendered, or goods delivered under a contract fixing by its terms such price, is to be in nowise thereby affected, after the contract has been terminated by the other party, against the will of the party performing?

This precise question, I believe, has not been heretofore decided by this court. In the case of *Taft v. Wildman*,¹ tried in this court at the December term, 1846, the court say: "In contracts where the precise sum is fixed and agreed upon by the parties, as in many actions of assumpsit and covenant, the jury are confined to that sum."

In the case of *Alden* and another, assignees of *Berkill*, a bankrupt *v.* *Keighley* (H. T. 1846),² *BULLOCK*, C. B., says: "But there are certain established rules according to which they (the jury) ought to find; and here, then, is a clear rule,—that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken." The action below was in general assumpsit, or upon an implied contract, charging the defendant with a breach of the implied contract, and asking a judgment for the resulting damages. To sustain his action the plaintiff proved the amount of services by him rendered for the defendants, at their request, and also the value of the services in the estimation of the witnesses; and upon such a state of facts, in the absence of its being shown that there was a special agreement between the parties in

¹ 15 Ohio R. 123.

² 15 M. & W. 117.

relation to the same, and the amount to be paid for the services so proved to have been rendered, the law implies an agreement or promise, on the part of the defendants, to pay so much to the plaintiff as the services were reasonably worth. Such is presumed to have been the mutual understanding of the parties, in the absence of any express promise. But as soon as it is made to appear that there was a special contract between the parties, under which the services were rendered, the law has respect to the actual contract, and will not presume or imply a different one; the object of courts being to enforce, not to make or change the contracts of parties.

In this view of the case, whether the contract has been fully performed by the plaintiff, or only partly performed, and prevented by the defendant; to obtain remuneration for the services so rendered, the plaintiff might, under our former practice, either commence an action of general assumpsit to recover the amount such services were actually worth, or an action of special assumpsit, and recover for a breach of the express contract, under which the services had been performed. The only difference would be, that if the action were commenced upon the expressed contract, the plaintiff might have to prove the terms of the contract, and the rendering of the services according to its terms; whereas, if the action were in general assumpsit the plaintiff would only be required to prove the fact of having rendered the services at the instance of the defendant, and the value of the services; and it would then be incumbent upon the defendants to prove the special contract, to take the case out of the implied contract. But when the special contract is proved, whether by the plaintiff or defendant, under which the services were rendered, the special, and not the implied contract must determine the rights and liabilities of the parties arising in regard to the services. The price having been determined and mutually agreed upon by them, neither of the parties can vary the price so fixed by the contract. Nor, as to the price of the services actually rendered under the contract, while in force between the parties, can it avail the plaintiff, bringing his action to recover therefor, that since the rendering the services, the defendant has put an end to the special contract. The fact would still remain, that the services were rendered under a special contract, and at the price agreed upon and expressed by the parties.

And if the action upon the contract so made by the parties, and terminated by the defendants against the will of the plaintiff, be brought to recover damages generally, the same rule would apply as to the services actually rendered. The party having rendered the services would be entitled to recover at the rate agreed upon and stipulated in the contract between the parties, although of much less value than the price expressed in the contract; and, in like manner, the plaintiff would be restricted to the amount stipulated in the contract as the agreed price, although actually of much greater value.

The action of assumpsit is termed an equitable action. When brought

to recover damages for breach of contract, whether express or implied, it is always for the recovery of money which the plaintiff, by reason of such delinquency of duty on the part of the defendant, is, in equity and good conscience, entitled to demand and receive of him. This is the argument : it is the duty of parties to perform their contracts ; and where one party has been delinquent in the performance of his contract, and damage has in consequence resulted to the other party, the party sustaining the damage has his right of action to recover the damage from the delinquent party. The actual damages resulting to the plaintiff from the breach of the contract by the defendant is the amount of damage which the defendant is liable to pay, and which the plaintiff is justly entitled to recover for such delinquency. This damage so occasioned the other party by the delinquency of the party failing to perform, may consist, partly in a neglect to compensate the other party for the part performance, and partly in terminating the contract, before fully performed by the other party, and preventing his acquiring the profit and benefit under it which he would otherwise have derived, and was legally entitled to ; or, the damage may have resulted from either. But it is certain that where there has been a part performance, and that part paid for, under the contract, according to its terms, and the contract has then been terminated wrongfully, by the party so having paid, it cannot be that the termination of the contract occasions damage or gives any right of action to the other party in regard to the part so performed and paid for under the contract. The damage in such a case, if any, arises from wrongfully precluding the other party from performing and receiving pay for that part of the contract unperformed on his part. And the question of damage, in such case, depends upon the terms of the contract, and circumstances of the case. If the proof shows that the plaintiff might have derived profit from the completion of the contract, on his part, he may be entitled to recover what the proof shows would have been the probable amount of the profit which he has so lost, as damages to which he is entitled for such termination of the contract. But where the proof shows that the plaintiff, by fully performing, would have realized no profit, but in fact sustained a loss, he cannot in any sense be found to have sustained damage, or entitled to recover any sum as damage for the termination of the contract by the other party.

It is true, that the early English writers, and among which authorities, perhaps, may be mentioned Bacon's Abridgment and Chitty on Contracts, seem to express the opinion that the contract itself hardly furnishes any measure of damages ; and that the amount of damages is to be left for the most part in actions on contract in such cases, in the same manner as in actions of tort, to the discretion of the jury. But the modern authorities are not so, subject to the general principle already stated, that the actual loss of the party is all for which the law gives him the right to recover compensation ; and it may be laid down as a rule, in all such cases, that

the express contract so existing between the parties, necessarily furnishes the measure of damages, to the extent of the evidence thereby afforded; and to the same extent as in actions brought to recover damages in like cases, where the contract continues in force, and has not been terminated, but only neglected and unperformed on the part of the defendant.

Thus, in the case of *Farrand v. Bouchell*,¹ the court say, "In no case where the action (assumpsit) is for money had and received, goods sold and delivered, or for work and labor performed, which from the nature of the contract itself furnishes the standard of assessment, are the jury allowed to give more than the amount received with interest, or the value of the articles delivered or the services rendered."

The counsel for the defendant in error refer to the case of *Clark et al. v. The Mayor of New York*,² as an authority to sustain their claim to recover the full amount of the costs of doing the work which had been done before the contract was terminated. PRATT, J., in delivering the opinion in that case, says: "It is clear, that under the common counts the plaintiffs cannot recover the same amount of damages which they might be entitled to recover in an action for a breach of the special contract. They must be confined in this action, either to the price of the work stipulated in the contract, or the actual worth of the work done. When parties deviate from the terms of a special contract, the contract price will, so far as applicable, generally be the rule of damages. But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for the breach of the contract, and recover all that he may lose by way of profits in not being allowed to fulfil the contract; or he may waive the contract, and bring his action on the common counts for work and labor, generally, and recover what the work done is actually worth." No authorities are referred to by the judge, nor was the expression of these remarks required to sustain the decision of the court. The opinion was pronounced at the December term, 1850, and it is quite possible the case of *Clark v. Marsiglia*,³ decided in the Court of Errors in that State, in July, 1845, may be the authority relied upon by the judge. In that case the only point before the court, and decided in the case, was the right of a party doing work once ordered, after a countermand of such order, to recover the agreed price at the time of making the order. The court, after deciding that the party ordering the work had a right to countermand the order, remark upon the occasional necessity of the party who employs another to do work under an express contract, to suspend the work and put an end to the contract. And in this connection the court say: "In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance, and indemnified for his loss in respect to the part left unexecuted." And this is, no doubt, a correct exposition of the party's right of action in

¹ 4 Harp. & B. 83.

² 4 Comst. 335.

³ 1 Denio, 317.

such a case, to wit, recompense for the work done, and remuneration for the profits lost on the work remaining to be done under the contract. But how recompensed for the work done? Certainly, by being paid precisely the price that both parties have agreed shall be paid, and accepted as its just value.

This case in *Denio*, then, is no authority; nor are we aware of any authority for the opinion so expressed by the judge in the case of *Clark v. The Mayor*, that "when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price;" and that, if he bring his action on the common counts for work and labor, he may "recover what the work done is actually worth;" and that "the actual value of the work and materials must be the rule of damages."

Indeed, there is no intimation by the court in this case of *Clark v. The Mayor*, of an intention to depart from the former holdings of the court in that State. In the case of *Koon v. Greenman*,¹ the question was directly presented to the court. *Greenman* had agreed to build two stacks of chimneys, etc., for *Koon* at a certain stipulated price, within a limited time. *Greenman* commenced the work, but was hindered by the neglect of *Koon* to perform, on his part, by furnishing materials, etc. *Greenman*, then, abandoned the job, and sued to recover for the work done. He gave evidence of the actual value of the work done, and by permission of the court was suffered to recover the full value of the work, although on the part of the defendant below, it was insisted that he was only entitled to recover at the rate specified in the contract. The case was brought before the Supreme Court of New York on this precise question at the May term, 1831, and the following is the opinion of that court upon this point as pronounced by SOUTHERLAND, J.: "Where a special contract is rescinded, or performance is prevented by the defendant, and the plaintiff seeks to recover for the work done under the general counts, the defendant may give the special contract in evidence, with a view to lessen the *quantum* of damages. So far as the work was done under the special contract, the prices specified in it are, as a general rule, to be taken as the best evidence of the value of the work. When it does not appear that the work was rendered more expensive to the plaintiff than was contemplated when the contract was made, or than it otherwise would have been, in consequence of the improper interference of the defendant, or of his neglect or omission to perform what, by the contract, he was bound to do, the contract price should be held conclusive between the parties," etc.

It is true, in the case of *Merrill v. The Ithaca and Owego Railroad Co.*,² the court hold that when delay is caused by the wilful acts or omissions of the party for whom the work is done, originating in a premeditated design to embarrass and throw obstacles in the way of performance by the other

¹ 7 Wend. 121.

² 16 Wend. 586.

party, who, notwithstanding, proceeds, and bestows his time and labor in attempting the completion of the job, until, in despair, he finally abandons the work, the rule that the special contract must control, as to the rate of compensation, no longer prevails, and the party is entitled to recover under a *quantum meruit*. But the court say, in that case, "If one party, by his conduct or silence, leads another to believe that he is at work for him on certain wages, he is estopped and shall not add to his demand." And it will be seen from the case itself that the increase of the price was really for other services not included in the contract, or rather for services rendered under different and more unfavorable circumstances than expressed, or contemplated by the parties in their contract. The case is, therefore, no departure from the rule expressed before by the same court in the case of *Koon v. Greenman*. For, in that case, it will be remembered, the court limit the rule to cases "where it does not appear that the work was rendered more expensive to the plaintiff than was contemplated when the contract was made," etc.

While it must be admitted that there are cases, and *dicta* of judges, frequently to be found in the books, which seem to sustain the rule given in charge to the jury by the District Court, I think the weight of authority, as well as the reason upon which the true rule of damage must necessarily rest, will be found very decidedly opposed to the instruction so given to the jury.

In the case of *Haywood v. Leonard*,¹ where the plaintiff was allowed to recover for work done under a special contract, on a *quantum meruit*, for building the house, not built according to the contract, the jury had been told at the trial to consider what the house was worth to the defendant, and to give that sum in damages; but the court held such instruction wrong, and that the jury should have been instructed to deduct so much from the contract price, as the house was worth less, on account of the departure from the stipulations of the contract. And the same doctrine is held in New York and other States, as applicable in like cases. Indeed, in the case of *Clark and others v. The Mayor of New York*, it was held that where parties deviate from the terms of a special contract to perform work and labor, in an action for work done, the contract price will, so far as applicable, generally be the rule of damages.

But a better illustration of the correctness of the rule of damage can hardly be found than is by this case presented in the record before us. The plaintiff brought his action below to recover the damages which he had sustained from the neglect of the defendants to perform their part of the contract. The only right of action asserted by the plaintiff in his declaration, was to recover the damage which the defendants by their delinquency in regard to the contract subsisting between the parties, had occasioned the plaintiff. It is true, the plaintiff below only stated the

¹ 7 Pick. 181.

performance of the services by himself, and complained of the defendants for not having paid him what the law would presume was agreed upon by the parties. But when an express agreement is proved to have been made by the parties, the law will not imply one; but looks to the existing contract between the parties.

How, then, stood the case between the plaintiff and defendants under that contract, as shown by the proof upon the trial; and what damage was McCullough thereby shown to have sustained from the delinquency or wrong-doing of Doolittle & Chamberlain, in regard to the contract between the parties?

The written contract required McCullough to do all the excavation at eleven cents per cubic yard. The proof shows that he proceeded to do the least expensive part of the work, the surface excavation, which, say the witnesses, might be done at from fifty to thirty-three per cent of the cost per yard required to do the remaining part of the work embraced in the contract. The proof also showed that the plaintiff had been fully paid the eleven cents per cubic yard for all the excavation and work by him done under and according to the terms of the written contract. But the plaintiff, it is true, proves that the excavation which he did under the contract actually cost or was worth from eighteen to twenty cents per cubic yard; and that Doolittle & Chamberlain had terminated the contract without his consent. In this state of facts the law gives McCullough this equitable action of assumpsit to recover from Doolittle & Chamberlain the damage which their wrongful termination or disregard of the contract has caused to him, McCullough. But McCullough can only recover the amount which he shows he has lost by such delinquency of Doolittle & Chamberlain. What then is the loss or damage which the proof shows McCullough sustained from the contract having been so terminated? McCullough's proof is, that it cost from eighteen to twenty cents to excavate, per cubic yard, that part of the job which he did; and all the proof goes to show that the residue of the excavation would cost from two to three times the amount per cubic yard, of that actually excavated. But the written contract, which the plaintiff complains that the other parties terminated, without his consent, required him to do all the excavation at eleven cents per cubic yard. And if the plaintiff's claim and proof are entitled to respect, the excavation actually done was worth from eighteen to twenty cents per cubic yard, the residue which the plaintiff has been so prevented from completing at eleven cents, would cost from thirty-eight to fifty-seven cents per cubic yard. It is shown by the proof that McCullough was paid more than the full average price of eleven cents per cubic yard, for all the excavation he did upon the job; the only damage, therefore, which he could possibly be entitled to recover was the pecuniary loss he sustained by being thus prevented from completing the residue of his job at a cost of from thirty-eight to fifty-seven cents per cubic yard, and receiving therefor eleven cents per cubic

yard. This is perfectly evident in fact ; and it also results from making the contract the measure of damages to the same extent intended by the parties, both at the commencement and performance of the work. And only by reference to the contract can the true amount of damages suffered by the plaintiff be ascertained.

The instruction given by the court below to the jury, that the plaintiff was entitled to recover the actual cost of the services rendered, regardless of the price fixed by the express contract, would allow the plaintiff to recover a large sum of money from the defendants without consideration and without cause. Indeed, it would allow the plaintiff not only to recover, without any cause of action being shown, but, in fact, his proof showed that the termination of the contract complained of had, in fact, occasioned him no loss, but had actually saved him from ruinous loss ; and to recover damages when he had sustained none, but had really derived a benefit and gain.

The judgment of the District Court must therefore be reversed.

SCOTT, C. J., and PECK, GHOLSON, and BRINKERHOFF, JJ., concurred.

McMANUS & HENRY v. CASSIDY.

IN THE SUPREME COURT OF PENNSYLVANIA, OCTOBER 24, 1870.

[*Reported in 66 Pennsylvania State Reports, 260.*]

OCTOBER 24th, 1870. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD and WILLIAMS, JJ.

Error to the Court of Common Pleas of Armstrong County : No. 26, to October and November term, 1869.

On the 30th of March, 1867, Robert Cassidy brought an action of assumpsit against Felix McManus and James G. Henry, partners as McManus & Henry.

The action was to recover the balance due on 2035 railroad ties delivered to the defendants under a contract under seal, made between the parties on the 9th of May, 1866, by which the plaintiff bound himself to deliver to the defendants 2000 ties, described in the agreement, to be inspected and approved ; in consideration of the plaintiff performing his covenants for delivering the ties the defendants agreed to pay him 60 cents per tie.

The plaintiff gave in evidence that he had delivered, under the contract, 2035 ties of the kind and in the manner stipulated in the contract. The ties amounted to \$1221, of which \$1047.74 had been paid to the plaintiff.

The defendants gave evidence in answer to the plaintiff's case, and submitted this point : —

Unless the jury believe that the sealed contract between the plaintiff and defendants was abandoned by both and all the parties, the plaintiff cannot recover.

The court (BUFFINGTON, P. J.) denied the point, and reserved it. He further charged :—

“ No doubt the plaintiff might have brought his action on the special agreement, but we are of opinion [he may sustain the present form of action if he fully performed the agreement on his part by furnishing the entire number of ties agreed upon]. There are cases where assumpsit will not lie. Where the plaintiff seeks to recover on an executory contract which has not been entirely fulfilled on his part, and has not been virtually rescinded by the defendant [the action must be founded on the special agreement. But not so where the agreement has been entirely complied with by the plaintiff, the consideration on his part entirely executed, nothing left unfinished, and nothing to be done by defendants but simply to pay the amount agreed upon]. Especially is this the case where the contract has been more than fulfilled by the plaintiff, and accepted and enjoyed by the defendant. [If the jury, therefore, believe that the contract was fully complied with by the plaintiff, by the delivery of the number agreed upon, or a number exceeding that agreed upon, which were accepted, inspected, and approved, we are of opinion that he may recover in this form of action for the entire number so delivered and inspected.] And we further are of the opinion that the written contract may be resorted to, to fix and ascertain the measure of damages. If, however, the jury should fail to find the contract to be completed by the plaintiff, he cannot recover.”

The jury found for the plaintiff \$183.65, and the court afterwards entered judgment on the verdict for the plaintiff on the reserved point.

The defendants took a writ of error, and assigned for error the denial of their point and the parts of the charge in brackets.

J. Gilpin for plaintiff in error.

E. S. Golden, with whom was *J. B. Neale*, for defendant in error.

The opinion of the court was delivered, January 3, 1871, by

AGNEW, J. With a great desire to sustain this judgment, we find ourselves unable to do so without assuming legislative powers. The courts both of England and of this State have felt themselves bound by the common law to maintain the boundaries between actions. Where a plaintiff has misconceived the form of his action, he must be turned out of court to begin anew, no matter what be the merit of his cause. This is a blot upon our jurisprudence, and should be remedied by the legislature. It can easily be done by simply giving to the courts the power to permit an amendment of the form of the action at any stage of the cause. Why should any one be turned away because of the dress in which he appears in court? The action in this case should have been covenant, and not assumpsit. It is certainly true, and well settled by authority, that when a

special contract has been fully performed, the party who has fully performed it may maintain general *indebitatus assumpsit*, and declare in the common counts for the work and labor or services rendered under it. *Kelly v. Foster*,¹ *Miles v. Moodie*,² *Algeo v. Algeo*,³ *Harris v. Liggett*,⁴ *Siltzell v. Michael*,⁵ *Eckel v. Murphy*,⁶ *Edwards v. Goldsmith*.⁷ The reason and foundation of this doctrine appears to be that when a service has been fully performed, a duty to compensate for it seems to arise independently of the special agreement. This, however, is really only seemingly so, and is probably fallacious; but the doctrine appears to be well settled, as the cases cited show. Yet, as the evidence that the doctrine cannot bear a severe test, we find it decided in several cases that part performance will not suffice, nor will prevention stand for full performance; and there the plaintiff must declare upon the special agreement, and show wherein his part-performance will entitle him to recover. *Algeo v. Algeo*; ⁸ *Harris v. Liggett*; ⁴ *Eckel v. Eckel*.⁶ All these cases, however, are where the special agreement has been by parol or a simple contract in writing. On a careful examination I have not found a single case where the special agreement was under seal. The doctrine seems to be universal that where the cause of action arises upon a *specialty*, or sealed writing, the action must be covenant or debt, as the case may be. The only exception to this is where the specialty has been altered by parol to such an extent as to make it a new contract, thereby turning the whole into parol; or where the specialty is abandoned and a new and independent contract made, though referring to the sealed instrument for some of its terms. Such are the cases of *Vicary v. Moore*,⁹ *Vaughn v. Davis*,⁹ *Spangler v. Springer*,¹⁰ *Lawall v. Rader*,¹¹ *Lehigh Coal & Nav. Co. v. Harlan*.¹² And a distinction is taken between a mere waiver of a term of the plaintiff's contract, which stands as a condition precedent to his action, and the contract of the defendant on which the action is founded; see *Jordan v. Cooper*,¹³ *Green v. Roberts*,¹⁴ *McCombs v. McKennan*.¹⁵ In the argument, the case of *McGran v. North Lebanon Railroad Co.*¹⁶ has been referred to as a case of a specialty where an action of *assumpsit* was sustained after performance. But the case is really put on the ground that the special contract had been abandoned, though it must be admitted that no single ground is very distinctly stated, and the reasoning of the opinion is not clear. On the other hand, the cases of *Irwin et al. v. Shirley*¹⁷ and *Shaffer v. Geisenburg*¹⁸ decide that *assumpsit* cannot be maintained upon performance of a contract under

¹ 2 Binn. 4.⁴ 1 W. & S. 301.⁷ 4 Harris, 43.¹⁰ 10 Harris, 455.¹³ 3 Serg. & R. 564.¹⁵ 2 W. & S. 216; 3 Casey, 441, 442.¹⁷ 10 Wright, 76.² 3 Serg. & R. 211.⁶ 3 W. & S. 329.⁸ 2 Watts, 451.¹¹ 12 Harris, 283.¹⁴ 5 Whart. 84.³ 10 Serg. & R. 285.⁶ 3 Harris, 93.⁹ 2 W. & S. 46.¹² 3 Casey, 441.¹⁶ 5 Casey, 82.¹⁸ 11 Wright, 500.

seal; and indeed they may be considered as really ruling the question before us, — for in both cases the special contract had been completed before the action was brought. The judgment must therefore be reversed.

Judgment reversed.

RUSSELL A. BALLOU v. HORACE BILLINGS AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 2, 1884.

[*Reported in 136 Massachusetts Reports, 307.*]

HOLMES, J.¹ This is an action to recover money paid under a contract which the plaintiff alleges to have been rescinded. The contract in question consisted of mutual covenants, by which the defendants agreed to convey certain land on payment by the plaintiff of certain sums, and the plaintiff agreed to pay those sums at the times fixed. The plaintiff did not pay at those times, but, under the instructions of the court, the jury must have found that the time was extended, and that, within the extended time, the plaintiff, having the power and ability to pay the remaining sums, offered to do so, demanded a conveyance, and was refused.

There was evidence justifying the finding that the time was extended, and that the demand was made within the time allowed, and under the circumstances of this case it is unnecessary to inquire further. For the jury may, and indeed must, also have found that the defendants totally repudiated all obligation on their part under the contract, whatever the plaintiff might do or be ready to do.

The defendants have taken that position from the beginning of the litigation between the parties, and at least say that they took it long before. Their answers to the plaintiff's bill in equity and to the declaration in this suit both deny the alleged extension of time upon which the continuance of their obligation was founded, and both set up that, by reason of the plaintiff's failure to pay at the time fixed, they had not been bound since 1875. The answer in equity adds, that they had always told the plaintiff so since that date. They confirmed their denial in their pleadings by testimony on the stand, both in equity and at law. They conveyed parcels of the land in question to other parties even earlier. The defendant Ambrose gives his belief that the plaintiff had no right to the land as the reason for his refusal to convey.

We must take it then that the defendant's refusal was not merely conditional, until the plaintiff should do something more, but an absolute unconditional repudiation of any obligation whatever, and, as the jury have found, at a time when the plaintiff was in no default. Such a repudiation did more than excuse the plaintiff from completing a tender; it authorized

¹ Only as much of the opinion is given as relates to the question of rescission. — Ed.

him to treat the contract as rescinded and at an end. It had this effect, even if, for want of a tender, the time for performance on the defendants' part had not come, and therefore it did not amount to a breach of covenant.

It is true that this was a contract under seal, and that it had been partly performed by the plaintiff. But part performance on the side of the party seeking to rescind does not affect his rights, as is shown by many cases. *Hill v. Green*; ¹ *Canada v. Canada*; ² *Goodman v. Pocock*.³ And, under the Massachusetts decisions, we do not think that the seal had any greater importance. It has been held, that a contract under seal may be rescinded by parol. *Hill v. Green*; ¹ *Munroe v. Perkins*.⁴ And *Hill v. Green* goes far to show that such a contract may be rescinded for breach by the other party. See also *Cook v. Gray*.⁵ Whether these cases would have been decided the same way in earlier times or not, we have no disposition to question them upon this point, and it is going very little further to hold that such a contract may be rescinded if it is repudiated by the other side. It is clear that, apart from technical considerations, so far as the right to rescind goes, notice that a party will not perform his contract has the same effect as a breach. *Phillpotts v. Evans*,⁶ *Frost v. Knight*.⁷ And the objection to a rescission of a sealed instrument by an act *in pais* is of no greater force where the ground of election is a refusal than where it is a breach, or than where there is a mutual consent to rescind. Our opinion is sustained by the language of *Daniels v. Newton*.⁸ See also *Quincy v. Carpenter*,⁹ *Dearborn v. Cross*,¹⁰ *Canal Co. v. Ray*.¹¹

As the defendants derive their right to keep the money from the contract alone, if the contract is rescinded the plaintiff is entitled to recover.¹²

¹ 4 Pick. 114.

² 6 Cush. 15.

³ 15 Q. B. 576.

⁴ 9 Pick. 298.

⁵ 133 Mass. 106, 111.

⁶ 5 M. & W. 475, 477.

⁷ L. R. 7 Ex. 111, 113.

⁸ 114 Mass. 530, 533.

⁹ 135 Mass. 102, 104.

¹⁰ 7 Cow. 48.

¹¹ 101 U. S. 522, 527.

¹² Where a contract, after part performance, is rescinded by the mutual agreement of the parties, the claim in respect of a consideration executed under it must be referred to the agreement for rescission; and in the absence of any express stipulation, or implied understanding upon the matter, no claim can be made. Thus, where a lease at a rent payable quarterly was put an end to during a current quarter by mere agreement and surrender of possession accepted by the landlord; it was held that the latter could afterwards make no claim for rent *pro rata* in respect of the broken quarter. (*Grimman v. Legge*, 8 B. & C. 324.) Where a contract of service was terminated by a mere tender of resignation on the one part accepted by the other, no reference being made to the time elapsed since the last payment of salary accrued due, it was held that no claim could afterwards be made for the services rendered during that period. (*Lamburn v. Cruden*, 2 M. & G. 253; see *Thomas v. Williams*, 1 A. & E. 685.)

Upon this principle where a partnership between two solicitors, upon entering which a premium had been paid on the one side, was dissolved by mutual consent unconditionally; it was held that no claim could be made for a return of any part of the premium. (*Lee v. Page*, 30 L. J. C. 857; 7 Jur. N. S. 768.) — *Leake, Digest of Law of Contracts*, 72.—Ed.

Rescission, or avoidance properly so called, annihilates the contract, and puts the parties in the same position as if it had never existed. Coolidge v. Brigham.¹

J. G. Abbott, J. A. Sawyer with him, for the defendants.

W. H. Drury, for the plaintiff.

Exceptions overruled.

SECTION III.

FAILURE OF PLAINTIFF TO PERFORM CONDITION OF CONTRACT.

(a.) *Wilfully or without Excuse.*

ELLIS v. HAMLEN.

IN THE COMMON PLEAS, JUNE 29, 1810.

[*Reported in 3 Taunton, 52.*]

THIS was an action brought by a builder against his employer upon a special contract for building a house of materials and dimensions specified in the contract, to recover the balance of the sum therein agreed on; the principal part of the price having been paid. Upon the trial of this cause this day at the sittings at Guildhall, before MANSFIELD, C. J., the defence was—and the evidence supported it—that the plaintiff had omitted to put into the building certain joists and other materials of the given description and measure. The counsel for the plaintiff proceeded to inquire of the witnesses what additional sum must be expended on the house to make it equal in value to that which was specified in the contract, contending that the plaintiff was entitled to recover in this action the whole sum which was specified in the contract, excepting thereout the amount of this difference in value, which, they said, would be the measure of damages if an action had been brought on the contract by the employer against the builder for not performing his contract; and that if the sums which had already been paid to the plaintiff on account did not amount to the whole price specified in the contract, deducting therefrom the amount of the before-mentioned difference in value, the plaintiff was entitled to a verdict for the residue, minus that difference.

MANSFIELD, C. J., was of opinion that the plaintiff, not having performed the agreement he had proved, must be nonsuited.

The plaintiff's counsel then resorted to a count which they found in the declaration, for work, labor, and materials, upon a *quantum valebant*, and said that the defendant, having the benefit of the houses, was bound at

¹ 1 Met. 547, 550.

least to pay for them according to their value. MASSFIELD, C. J. Suppose you had come hither upon a *quantum valent* only, could you have recovered on it? Certainly not. The defendant would have said, "I made no such agreement; I agreed to pay you if you would build my house in a certain manner, — which you have not done." Here the plaintiff has properly declared on his special contract, and he has shown and proved that he made such a contract, and has received much money on it. He cannot now be permitted to turn round and say, "I will be paid by a measure-and-value price." The defendant agrees to have a building of such and such dimensions; is he to have his ground covered with buildings of no use, which he would be glad to see removed, and is he to be forced to pay for them besides? It is said he has the benefit of the houses, and therefore the plaintiff is entitled to recover on a *quantum valent*. To be sure, it is hard that he should build houses and not be paid for them, but the difficulty is to know where to draw the line; for if the defendant is obliged to pay in a case where there is one deviation from his contract, he may equally be obliged to pay for anything, how far soever distant from what the contract stipulated for.

The plaintiff accordingly was nonsuited, and the case was never again moved.

WALKER v. DIXON.

AT NISI PRIUS, BEFORE LORD ELLENBOROUGH, C. J., DECEMBER 23, 1817.

[Reported in 2 Starkie, 281.]

THIS was an action to recover the value of eight sacks of flour, alleged to have been sold and delivered to the defendant. Plea, *non assumpsit*.

It appeared that the plaintiff had contracted for the sale of 100 sacks of warranted flour to the defendant, at 94s. 6d. per sack; ten sacks to be sent immediately on trial; to be accepted or rejected in two days from the sending the ten sacks. Ten sacks had accordingly been sent, of which the defendant retained four, sending six back, because they were of secondary quality, and desiring that the error might be rectified. Ten other sacks had afterwards been sent by the defendant [plaintiff] to the wharf of Raymond and Storey, these were approved of by the plaintiff [defendant], and he took two of them, leaving the remainder at the wharf, to await his further orders, and these were afterwards taken away by the plaintiff, who refused afterwards to complete his engagement for the 100 sacks. The defendant afterwards insisted upon his delivering the remainder of the flour, and tendered him the whole amount, giving him notice that if he did not deliver the rest he would purchase the same quantity elsewhere, and charge him with the difference.

It was contended, on the part of the defendant, under the circumstances, that since the contract was entire the plaintiff could not split it into parts, and bring his action for part of the flour, and thereby substitute a different contract from that contemplated by the parties.

Topping and Comyn for the plaintiff.

Scarlett and Wilde for the defendant.

LORD ELLENBOROUGH. This is the case of an entire contract for 100 sacks; part of these were delivered, to which objection might have been made as to quality, but the party did not stand upon that objection, but offered to pay the whole. And since the defendant was ready to perform the contract, and to pay for the whole at the price agreed upon, including the four sacks which were objected to, I am of opinion that the plaintiff could not afterwards split the contract, and bring his action for part only. If the defendant had insisted upon an abatement being made in respect of the first four, I might have thought differently.

*Plaintiff nonsuited.*¹

SHIPTON AND ANOTHER v. CASSON.

IN THE KING'S BENCH, APRIL 28, 1826.

[Reported in 5 *Barnewall & Cresswell*, 378.]

ASSUMPSIT. The declaration, which was of Easter term, 5 G. 4, contained the common counts for work and labor, and the money counts. Pleas, the general issue and set-off for goods sold and delivered, money lent, paid, etc. At the trial before ABBOTT, C. J., at the London sittings after Hilary term, 1825, a verdict was found for the plaintiffs for 466l. 19s. 3d., subject to the opinion of this court upon the following case:²—

The defendant proved by way of set-off, the delivery of bark to the plaintiffs to the amount of 23l. 4s., on the morning of the 26th of November, 1823. In answer to which the plaintiffs proved that such bark was part of a quantity bargained by the defendant to be delivered to the plaintiffs by the following contract: "Sold T. Shipton & Son the whole of the bark laid in B. Boyes' warehouse, for 5s. per ton on the invoice price, to be transferred to his account; and after this, the 26th of November, at their risk and expense, — the quantity about 57 tons, 17 cwt. B. Casson paying all expenses of delivery." The invoice price was 10l. per ton. Barges were hired by the plaintiffs to take away the bark, and one laid for some days waiting for the bark, and then went away, the defendant having failed to deliver the residue of the quantity stipulated according to his contract, within a reasonable time after the contract. It appeared that Mr. Boyes,

¹ This nonsuit is said to have been set aside; see *infra*, 137. — ED.

² Only so much of the case is given as relates to the plea of set-off. — ED.

in whose possession the said bark was, stopped the delivery of the residue to the plaintiffs, and they only obtained bark to the value of 23*l.* 4*s.*, in part of the said entire quantity. The first instalment of 7*s.* in the pound on the said debt of 707*l.* 13*s.* 3*d.*, due from the defendant to the plaintiffs, amounted to 247*l.* 13*s.* 7*d.*, being 5*l.* 3*s.* 1*d.* more than the sum remitted. If the 23*l.* 4*s.* for the bark delivered to the plaintiffs was to be deducted and allowed to the defendant from the sum of 707*l.* 13*s.* 3*d.*, then 7*s.* in the pound on the residue left the remittance made by H. Casson 2*l.* 19*s.* 3*d.* more than the first instalment would amount to. This action was commenced before the second instalment became due. The case was now argued by

Chitty for the plaintiffs.

Parke, contra, was stopped by the court.

ABBOTT, C. J. The first question is, whether the sum sent as payment of the first instalment was sufficient; that depends upon the question whether the plaintiffs were bound to pay for the bark, which they received and kept, according to its just value, or whether they were entitled to keep it without making any such payment. I agree, that if a contract is made for the purchase of a large quantity of any article, and a part only is delivered, the vendee is not bound to pay for that part before the expiration of the time fixed for the delivery of the whole.¹ For if the seller fails to complete his contract, the purchaser may return the part delivered. But the case is very different if he elects to keep that part; he must then pay the value of it; and in contracts for the sale of goods the value of a part may always be ascertained. It is said, that the value not being ascertained cannot be set off; but the common form of set-off is, that the plaintiff is indebted for goods sold and delivered, which, at the time of the sale and delivery, were worth such a certain sum. In the case of a contract which cannot be well severed, difficulties as to such a set-off may arise, *e. g.*, if a contract is made for building a house, and that is only performed in part, it may be difficult to sever the value of the part finished from the value of that which remains to be done; but no such difficulty occurs in the present case. This second question is, whether the remittance came in time, and was of a proper nature. I agree that the plaintiffs were not bound to accept it; they might have returned it, and insisted upon their right of action. But instead of that they made the amount available to their own purposes, and undertook to place it to the credit of the defendant's account. Having done so, as against the plaintiffs, it must be taken that there was no objection either to the nature of the remittance or the time when it was made.

BAYLEY, J. I am of opinion that the remittance was sufficient, and that the objection to the time when it was sent and the manner in which it was made up, was waived by the plaintiffs. Where an entire contract for

¹ Waddington v. Oliver, 2 N. R. 61, *accord*. — Ed.

goods is performed in part, and the whole may be completed, no action will lie in respect of that which has been done until after the expiration of the time fixed for the completion of the whole. But where some of the goods have been delivered, and the vendee does not return them upon the failure of the vendor to perform his part of the contract, the latter may bring an action for the value (not the stipulated price) of those goods, although he is liable to a cross action for the breach of his contract. I therefore think, that the sum of 23*l.* 4*s.*, the value of the bark delivered, may properly be considered as constituting an item of set-off at the time when the instalment became due, although it might not be so immediately on the delivery of the bark. Secondly, it seems clear that the plaintiffs waived all objection to the payment made by H. Casson. After receiving the bills they wrote and informed him that the amount should be placed to his son's account; but the father sent them in discharge of the instalment then due, and the plaintiffs had no right to place them to any other account. Having kept the bills and applied them to that account, they cannot now say that the remittance was too late, or that they were not bound to take the bills in payment.

HOLROYD and LITTEDALE, JJ., concurred.

Postea to the defendant.

SINCLAIR AND ANOTHER v. BOWLES.

IN THE KING'S BENCH, FEBRUARY 6, 1829.

[Reported in 9 Barnewall & Cresswell, 92.]

THIS was an action of assumpsit for work and labor done, and materials found and provided, and goods sold, &c., brought by the plaintiffs, who were glass-cutters and benders, against the defendant, who was a tavern-keeper. At the trial before PARKE, J., at the London sittings in this term, the plaintiffs proved that they had repaired three glass chandeliers for the defendant, and that 10*l.* was a reasonable price for the work done and materials provided. On the part of the defendant it was proved that in April last one of the plaintiffs called upon him and asked if he wanted any new chandeliers. The defendant said he did not, but that he wanted some old ones repaired; he desired the plaintiff to look at them minutely and to say what he could do them for. The plaintiff at first said he would do them for 8*l.* The defendant observed that a great deal must be done to them, that three arms were wanting, and that if the plaintiff would do them complete, so as to look well, he would give 10*l.* The plaintiff then looked at them again and said he would make them complete for that sum. On the following day the plaintiff came to take them away, and the defendant then told him not to take them away unless he would make

them complete for the 10*l*. The plaintiff took them away. They were brought back in a few days. They had been cleaned, and some icicles and drops supplied, but they were not in a perfect state. One of the arms, which was perfect when it was taken away, was broken, and several of the spangles and icicles damaged; and in one of the chandeliers the scroll, which had been sent damaged, was brought back in the same state. Upon this the defendant refused to give the plaintiff an order for the money. It was contended on the part of the plaintiff's that even if the jury believed the evidence given on the part of the defendant, the plaintiffs were entitled to recover for the work actually done, and materials provided for the chandeliers. The learned judge was of opinion that the contract between the parties was entire, and that the plaintiffs were not entitled to recover at all unless they had made the chandeliers perfect, according to the contract; but in order to save expense to the parties, he left it to the jury, upon the evidence, to say, first, whether the contract had been substantially completed according to the intention of the parties; and if it had not, secondly, whether the defendant had derived any benefit, and to what amount, for the work done. The jury found, first, that the contract had not been performed; and secondly, that the defendant had derived benefit from the work done, to the amount of 5*l*. The learned judge then directed a nonsuit, but reserved liberty to the plaintiffs to move to enter a verdict for 5*l*.

Gurney now moved accordingly. The defendant, having derived benefit from the work done by the plaintiffs, is in justice bound to pay for it. [BAYLEY, J. The contract was entire, — the defendant (plaintiff) having never been discharged from his obligation to complete it.] Where an entire contract for goods is performed in part, and some of the goods have been delivered, and the vendee does not return them upon the failure of the vendor to perform his part of the contract, the vendor may bring an action for the value of the goods delivered, although he is liable to a cross action for the breach of his contract. Here the plaintiff not only cleaned the chandeliers, but he provided icicles and drops; the things so provided ought to have been returned.

LORD TEXTERDEN, C. J. The plaintiff ought to have demanded those articles. The contract between the parties was, that the plaintiff should make the chandeliers perfect for 10*l*. The plaintiff has not performed his part of the contract, and cannot, therefore, recover anything in this form of action.

Rule refused.

OXENDALE v. WETHERELL.

IN THE KING'S BENCH, MAY 8, 1829.

[Reported in 9 Barnewall and Cresswell, 386.]

ASSUMPSIT for wheat and other corn, goods, wares, and merchandises sold and delivered. Plea, general issue. At the trial before BAYLEY, J., at the spring assizes for the county of York, 1829, the following appeared to be the facts of the case. The action was brought to recover the price of 130 bushels of wheat, sold and delivered by the plaintiff to the defendant, at 8s. per bushel. Evidence was given on the part of the plaintiff, that on the 17th of September, 1828, he had sold to the defendant all the old wheat which he had to spare at 8s. per bushel; and that he had delivered to the defendant 130 bushels. The defendant gave evidence to show that he had made an absolute contract for 250 bushels, to be delivered within six weeks, that the price of corn at the time of the contract was 8s. per bushel, and afterwards rose to 10s.; and it was insisted on his part, that the contract being entire, the plaintiff not having delivered more than 130, had not performed his part of the contract, and therefore could not recover for that quantity. On the other hand, it was contended that the vendor having delivered, and the vendee having retained part, the contract was severed *pro tanto*, and that the plaintiff was entitled to recover the value. The learned judge was of opinion, that even if the contract was entire, as the defendant had not returned the 130 bushels, and the time for completing the contract had expired before the action was brought, the plaintiff was entitled to recover the value of the 130 bushels which had been delivered to and accepted by the defendant; but he desired the jury to say, whether the contract was entire for 250 bushels, and they found that it was. Whereupon a verdict was entered for the plaintiff, and the defendant had liberty to move to enter a nonsuit if the court should be of opinion that the plaintiff was not entitled to recover, on the ground that he had not performed the contract.

Brougham now moved accordingly, and relied upon *Walker v. Dixon*.¹

LORD TENTERDEN, C. J. In Manning's Digest, p. 389, the court are stated to have set aside the nonsuit, *ex relatione Wilde*, of counsel for the defendant. If the rule contended for were to prevail, it would follow, that if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole.

BAYLEY, J. The defendant having retained the 130 bushels after the time for completing the contract had expired, was bound by law to pay for the same.

¹ 2 Stark. 281.

PARKE, J. Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered.¹

Rule refused.

TURNER v. ROBINSON AND ANOTHER.

IN THE KING'S BENCH, MICHAELMAS TERM, 1833.

[*Reported in 5 Barnewall and Adolphus, 789.*]

ASSUMPSIT for work and labor. At the trial before DENMAN, C. J., at the London sittings after Trinity term, 1833, the following facts appeared. The defendants were silk manufacturers; the plaintiff acted as their foreman from January to June, 1831, and sought to recover in this action a remuneration for his services during that period. The evidence as to the amount of wages was, that it had been agreed between the plaintiff and defendants, that the plaintiff was to have wages at the rate of 80*l.* per year. In June, 1831, the plaintiff was dismissed by the defendants, for having advised and assisted their apprentice to quit their service and go to America, and for that, the defendants had brought an action against the plaintiff, and recovered 40*s.* damages. It was contended for the defendants, that it must be taken on this evidence, that the plaintiff had been hired for a year, and having been rightfully discharged from their service for misconduct during the year, was not entitled to recover wages *pro rata*, and *Spain v. Arnott*² was cited. The LORD CHIEF JUSTICE was of opinion that there was nothing to repel the ordinary presumption, that the servant was hired for a year; and that being so, the whole wages were forfeited before the term expired, by his misconduct, whereby the defendants were prevented from having his services for the whole year. He therefore directed a nonsuit, reserving liberty to move to enter a verdict for the plaintiff.

Law in this term moved to enter a verdict. There was no proof that the plaintiff was hired for an entire year. The evidence as to that was only that he was to have wages at the rate of 80*l.* per year. Besides, here the

¹ In the report of this case found in 7 L. J. 264, 265, Mr. Justice PARKE is reported as making the following additional remark, "Thus if the contract is to deliver three articles and the seller sends but one, the buyer may, if he please, refuse to receive it, but, if he receive it, he must pay for it, though the contract to deliver the three be not performed. For the breach of that contract he must resort to his action." — ED.

² 2 Stark. N. P. C. 256.

defendants had already recovered against the plaintiff for his misconduct in enticing the apprentice from their service. [PARKE, J. *The prima facie* presumption was, that the plaintiff was hired for a year; and there was nothing to rebut that presumption: and having violated his duty before the year expired, so as to prevent the defendants from having his services for the whole year, he cannot recover wages *pro rata*.]

*The court*¹ *refused the rule.*

JOHN MUNRO v. PHELPS JOHN BUTT.

IN THE QUEEN'S BENCH, JANUARY 18, 1858.

[Reported in 8 Ellis & Blackburn, 738.]

FIRST count: that, before the making of the agreement hereinafter mentioned, one Donelly had contracted and agreed with the defendant that, on or before the 24th day of June, A. D. 1855, unless the defendant should consent to extend such time, he would, at his own expense, erect and cover in and completely fence in, under the direction or with the approbation of the defendant's surveyor for the time being, on the plot of ground then thereby agreed to be demised, two messuages or dwelling-houses of not less value, when completely finished, than 900*l.* each, in a substantial and workmanlike manner, with good and proper materials, according to the specification and plan signed between the parties; and should and would completely finish the said messuages fit for habitation within six months after the day fixed for the same to be so covered in; and afterwards, to wit, on the 21st day of December, A. D. 1855, it was agreed between the plaintiff and the defendant as follows: that the plaintiff should, within one calendar month from the date of these presents, at his own charge and cost, well and effectually complete and finish the said two houses pursuant to and in accordance with the terms of the said building agreement between the said Donelly and the defendant, and the specification or specifications thereto annexed, and subject as aforesaid to the approval of the surveyor of the said defendant; that, in the event of the said houses being so completed and finished by the plaintiff as aforesaid, the defendant should pay the plaintiff the sum of 240*l.*: that, for the purpose of the completion of the houses by the plaintiff as aforesaid, the defendant, by the same agreement, consented and agreed with the plaintiff to extend the time fixed for the completion of the said houses by the said Donelly to the 21st day of January, A. D. 1856, and the defendant also undertook that no objection should be raised to any portion of the works then remaining unimpaird, which were executed by the said Donelly prior to the granting of the certificate therein mentioned by the surveyor of the defendant to the said Donelly, pursuant to the said building agree-

¹ DENMAN, C. J., PARKE, TAUNTON, and PATTESON, JJ.

ment; and that time should in all things in the said agreement with the plaintiff contained be considered of the essence of the contract; and the plaintiff hath duly performed the said agreement on his part, except as to the completion of the aforesaid works within the time in that behalf aforesaid; which completion within such time the defendant dispensed with; and the said sum of 240*l.* had become and was due and payable to him before snit; and all things to entitle the plaintiff to payment thereof, and to sustain this action for the non-payment thereof, had before then happened; yet no part thereof hath been paid. Common counts for work and materials, and on accounts stated.

Pleas to the first count: 1. That the defendant did not agree as alleged; 2. That he did not dispense with the completion of the said works within the time mentioned; 3. That the messuages or dwelling-houses were not completed and finished to the approval of the surveyor of the defendant. To the common counts: Never indebted.

Issue on all the pleas except the second. To the second and third, demurrers. Joinder.

The issues were tried before WIGHTMAN, J., at the sittings at Westminster in Trinity term, 1857; when the following facts were proved. The defendant was the owner of certain plots of land, part of the St. Margaret's Estate at Twickenham in Middlesex. The estate belonged to The Conservative Land Society; and the defendant had become entitled to the plots under the rules of the Association. By an agreement dated the 31st of January, 1855, between the defendant and one Donelly, the defendant agreed to demise the said plots of land to Donelly, and Donelly agreed, in consideration thereof, to build upon the said plots two dwelling-houses, to be completed on or before the 24th of June, 1855. By the agreement the defendant (therein called the lessor) agreed to advance to Donelly (therein called the lessee) 1,200*l.* by instalments, towards the building, etc., the same to be secured by mortgage, etc. The agreement contained a right of re-entry by the lessor in case any of the stipulations in it should not be performed, and particularly in case the houses should not be completed at the date mentioned. The agreement then contained a covenant by Donelly that he would, on or before the 24th of June, 1855, unless the time was extended by the defendant or his assignees, erect, cover, and completely fence in, under the direction or with the approbation of the surveyor for the time being of the defendant or his assigns, on the said plots of ground in the agreement mentioned, two messuages or dwelling-houses of not less value than 900*l.* each, in a substantial and workmanlike manner, according to a specification and plan agreed upon between the parties, and would completely finish the said messuages fit for habitation within six months after the day so fixed for the same to be so covered in. The defendant by the same agreement covenanted with Donelly that, as soon as the said Donelly had completed fit for habitation the said messuages or dwelling-

houses, he would demise them, with the plots of ground, to the said Donelly for a term of 99 years. The works were commenced by Donelly in April, 1855, and were continued until November of the same year, when Donelly was arrested for debt. At that time the works were incomplete, and Donelly was unable to complete them. The houses had before that time been mortgaged to The Conservative Land Society by Donelly, with the assent of the defendant, for moneys advanced by the Society. On the 21st of December, A. D. 1855, the following memorandum of agreement was signed by the plaintiff and C. P. Butt, the son of and then acting as the agent of and for, the defendant. "Memorandum of Agreement, made the 21st day of December, 1855," etc. "The said John Munro, for himself," etc., "doth hereby agree," etc., "and the said P. J. Butt, for himself," etc., "doth hereby agree," etc., "in manner and form following, that is to say: that the said John Munro will, within one calendar month from the date of these presents, at his own charge and cost well and effectually complete and finish, or cause to be completed and finished, the two houses and villas, situate at," etc., "called respectively," etc., "and now let on lease by the said P. J. Butt to one Donelly, such houses or villas to be completed and finished pursuant to and in accordance with the terms of the building agreement made and entered into between the said Donelly and the said P. J. Butt, and bearing date the 16th day of February, A. D. 1855, and the specification or specifications thereto annexed, and subject as therein provided to the approval of the surveyor of the said P. J. Butt; that, in the event of the said houses being so completed and finished by the said J. Munro as aforesaid, the said P. J. Butt will pay, or cause to be paid, to the said J. Munro the sum of 240*L*.; and, for the purpose of the completion of the houses by the said J. Munro as aforesaid, the said P. J. Butt hereby consents and agrees with the said J. Munro to extend the time fixed for the completion of the said houses by the said Donelly to the 21st of January, 1856; and also undertakes that no objection shall be raised to any portion of the works now remaining unimpaired which were executed by the said Donelly prior to the granting of the last certificate by the surveyor of the said P. J. Butt to the said Donelly pursuant to the said building agreement. It is also agreed by and between the parties to these presents that time shall in all things herein contained be of the essence of the contract. In witness," etc. In pursuance of this agreement the plaintiff employed workmen to complete the works under the superintendence of Donelly. They were not completed on the 21st, but were alleged to be completed on the 26th of January, 1856; when application for payment of the 240*L*. was made to Mr. C. P. Butt, on the ground that the houses were then complete. He refused to pay without the certificate of his surveyor, who examined the houses, declared them to be incomplete, and refused to give a certificate. At that time Donelly was in occupation of the houses, and so continued until and after the 8th of March, 1856; when he was

adjudicated a bankrupt. The assignees of Donelly claimed the equity of redemption in the houses, subject to the mortgage thereof to The Conservative Land Society; and their claim was purchased by the defendant for 150*l*. The plaintiff, besides proving these facts, gave in evidence a letter from G. H. Butt, acting for the defendant, to the plaintiff, dated the 7th of February, 1856, in the following terms: "Sir, I have seen Mr. Paxon to-day; but no progress appears to have been made with Donelly's judgment-creditors. Should they refuse to do what we require of them, I shall probably take the course I intended yesterday. My object is to secure your money and my own before letting anything go to the other creditors," etc. The plaintiff then proved a letter from G. H. Butt to Donelly, dated the 19th of July, 1856, in the following terms: "Mr. Butt will be obliged to Mr. Donelly if he will write him a line stating who is at present in possession of Campanile House and Campanile Villa, the property of his, Mr. Butt's, father. Mr. B. has heard accidentally of the houses being in possession of a man from London, though Mr. Donelly is not gone out; and Mr. B. would be glad if Mr. D. could inform him what this means, or who the said man from London is," etc. No answer to this letter was read. It was suggested that the person mentioned was a person claiming to take possession on behalf of a Mr. Burgess, as mortgagee from the defendant. The plaintiff then proved another letter from Mr. G. H. Butt to Donelly, dated the 23d of July, 1856, in the following terms: "Many thanks for your firmness in keeping possession of the houses. When my brother left England, my father revoked the power of attorney which he had given to him and executed a similar one to me; so that you can make use of my name as authority for keeping possession," etc. "I do not understand the position in which you are placed: but I imagine that you are perfectly safe in keeping possession till you have a letter from some one who has power to instruct you to resign. That power is now in my hands, and I will act upon my right of attorney according to what I hear from Burgess." On the 9th of August, Mr. G. H. Butt wrote to Donelly. "I have just received the enclosed note from my father. You will see by it that he has no choice left but to request you to withdraw, and let the man sent by Mr. Burgess into full possession of the houses." This letter enclosed one from the defendant to G. H. Butt in these terms. "We have been in error about the man sent to Twickenham by Burgess; there was nothing hostile in the proceeding, which has been properly explained to me; and I have no other course but to request Donelly to withdraw and leave the man in possession. Will you therefore send him instructions accordingly? Perhaps the best way will be to enclose this note as my authority for the step." It was further proved that in April, 1856, the defendant and his son, C. P. Butt, went over the houses with a Mr. Long, a house and estate agent, and authorized him to let or sell them, and employed him to do some small work in them. No surveyor's certificate was ever procured by

the plaintiff. Upon this evidence it was contended at the trial, on the part of the defendant, that the plaintiff could not recover on any count; not on the special count, because the conditions precedent were not fulfilled; not on the common counts, because there were still other matters open on the special contract than the mere payment of the money, and there was no evidence that the contract was rescinded or that a new contract was undertaken. It was contended, on behalf of the plaintiff, that the defendant was liable upon a *quantum meruit* to pay for the work actually done by the plaintiff, on the ground that he had taken possession of the houses, and thereby of the work done by the plaintiff thereon. The learned judge held that there was no evidence to go to the jury to show that the special contract had been abandoned by the parties and a new one substituted, either expressly or by implication, to pay for the work actually done and materials actually supplied according to their value; and he therefore nonsuited the plaintiff, giving him leave to move to enter a verdict, if the court should be of opinion that there was evidence which ought to have been left to the jury.

H. Hawkins, in the same term, obtained a rule *nisi* accordingly. In the following term¹

Hugh Hill and *H. Bullar* showed cause.

Raymond, in support of the rule.

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the court.

This was a rule to set aside a nonsuit. The action was brought to recover compensation for work and labor. The work and labor had been done upon two houses of the defendant under a special agreement, two stipulations of which were that the whole was to be completed on a specified day, and that it was to be done to the satisfaction of a surveyor named. The declaration, as to the first of these conditions, both of which had been held on demurrer to be conditions precedent to the right to recover, alleged a dispensation by the defendant, and performance as to the latter. The defendant, by his pleas, traversed both the dispensation and the performance. There were, besides, the common *indebitatus* counts for work and labor and materials; and to these the defendant pleaded *numquam indebitatus*. There was clearly no evidence of any certificate by the surveyor, or any other expression that he was satisfied. The plaintiff, therefore, could not recover on the special count: and the main question in the argument before us was, whether there was not such evidence of a mutual abandonment of the special contract, and the substitution of a new implied contract to pay for the work done and materials supplied according to their value, as ought to have gone to the jury. That cases may exist where, the special contract remaining open and unperformed, an action may still be maintained for compensation on a new contract implied by law, cannot now be

¹ November 11, 1857. Before Lord CAMPBELL, C. J., COLERIDGE and WIGHTMAN, JJ.

disputed. The subject is very ably considered, and the cases collected, in the notes ¹ on *Cutter v. Powell*, 6 T. R. 320. But it is unnecessary for us to follow the learned counsel through their argument, because it appears to us that there was no evidence in this case from which such a contract could be properly inferred by the jury. The facts relied on by the plaintiff were that, the work on the house still remaining unfinished, and no certificate having been procured, the defendant had yet resumed possession and was enjoying the fruits of his labor. Of this there certainly was some, though slight, evidence. Now, admitting that in the case of an independent chattel, a piece of furniture for example, to be made under a special contract, and some term, which in itself amounted to a condition precedent, being unperformed, if the party for whom it was to be made had yet accepted it, an action might, upon obvious grounds, be maintained, either on the special contract with a dispensation of the conditions alleged, or on an implied contract to pay for it according to its value; it does not seem to us that there are any grounds from which the same conclusion can possibly follow in respect of a building to be erected, or repairs done, or alterations made, to a building on a man's own land, from the mere fact of his taking possession. Indeed the term "taking possession" is scarcely a correct one. The owner of the land is never out of possession while the work is being done. But, using the term in a popular sense, what is he, under the supposed circumstances, to do? The contractor leaves an unfinished or ill-constructed building on his land; he cannot, without expensive, it may be, tedious, litigation, compel him to complete it according to the terms of his contract; what has been done may show his inability to complete it properly; the building may be very imperfect, or inconvenient, or the repairs very unsound; yet it may be essential to the owner to occupy the residence, if it be only to pull down and replace all that has been done before. How then does mere possession raise any inference of a waiver of the conditions precedent of the special contract, or of the entering into a new one? If indeed the defendant had done anything, coupled with the taking possession, which had prevented the performance of the special contract, as if he had forbidden the surveyor from entering to inspect the work, or if, the failure in complete performance being very slight, the defendant had used any language, or done any act, from which acquiescence on his part might have been reasonably inferred, the case would have been very different. Here there was nothing of that kind; the reliance of the plaintiff was simply on the defendant's possession.

We were pressed of course with the argument of hardship; it was said to be unjust that the defendant should enjoy the labor expended and materials furnished by the plaintiff. The argument of hardship in a particular case is always a dangerous one to listen to; but in truth there is neither hardship nor injustice in the rule with its qualification: it holds men to their con-

¹ 2 Smith's L. C. 29 (11th Ed.).

tracts; it admits, from circumstances, the substitution of new contracts; nor is there any hardship in the present case disclosed by the evidence; and a verdict for the plaintiff might work a greater hardship on the defendant compatibly with that evidence.

We think the rule ought to be discharged.

*Rule discharged.*¹

Ex parte BARRELL. *In re* PARNELL.

IN CHANCERY, JULY 22, 1875.

[*Reported in Law Reports, 10 Chancery Appeals, 512.*]

This was an appeal from an order of Mr. Registrar HAZLITT, sitting as Chief Judge in Bankruptcy, made in the bankruptcy of George Thomas Parnell.

By an agreement in writing made on the 7th of January, 1874, and signed by both parties, Richard Barrell agreed to sell to George Thomas Parnell certain freehold and copyhold hereditaments at East Bergholt, in the county of Suffolk, for £3000, of which the sum of £300 was to be paid as a deposit immediately after the signing of the agreement, and the residue thereof on the completion of the purchase; and it was agreed that the purchaser should take the fixtures at a valuation. It was also stipulated that the purchase should be completed on the 24th of June, 1874, and that if from any cause whatever the purchase should not be completed on that day, the purchaser should pay to the vendor interest on the residue of the purchase-money, and on the valuation of the fixtures, after the rate of £5 per cent, from that day till the completion of the purchase.

The agreement also contained provisions for the delivery of the abstract of title, and for sending in objections; but it contained no stipulation as to the forfeiture of the deposit in case of the contract failing through the default of the purchaser. || K

The deposit of £300 was paid to Barrell in pursuance of the contract, and an abstract of title was sent to the solicitors of the purchaser within the appointed time, and the title was eventually accepted by the purchaser and the draft conveyance prepared. As, however, the purchaser delayed the completion of the purchase, the vendor, on the 25th of March, 1875, filed a bill against him to enforce specific performance. B. v. P. 1875.

On the 2d of April, 1875, Parnell was adjudicated a bankrupt, and by a letter dated the 11th of June, 1875, the trustee, in reply to a notice sent to him by Barrell under the 24th section of the Bankruptcy Act, 1869, formally disclaimed the contract of the 7th of January, 1874, and required the repayment of the deposit of £300. Barrell having refused to repay the deposit, the trustee applied to the court to order the repayment, and the

¹ Reported by W. B. Brett, Esq.

Registrar made an order that Barrell should pay the sum of £300 into court to abide the result of any application for damages which might be made by him.

From this order Barrell appealed.

Mr. *Robinson*, Q. C., Mr. *Julian Robins*, and Mr. *Leeke*, for the appellant, were stopped by the court.

Mr. *E. Cooper Willis*, for the trustee.

Sir W. M. JAMES, L. J. The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, Give me back the deposit. There is no ground for such a claim. The order of the registrar must be discharged.

Sir G. MELLISH, L. J. I am of the same opinion. It appears to me clear that, even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money, as the contract has gone off through his default.

JENNINGS v. CAMP.

IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW YORK,
JANUARY, 1816.

[*Reported in 13 Johnson, 94.*]

IN error, from the Court of Common Pleas of the county of Madison.

The plaintiff's declaration was in assumpsit, and contained two counts. The first count stated an agreement between the plaintiff and defendant, in the court below, dated the 1st of July, 1812, by which Camp, the plaintiff below and defendant in error, agreed to log up, burn, and clear, fit for sowing, ten acres of land on a certain lot belonging to the defendant below, the plaintiff in error, in a good, farmerlike manner, by the 20th of September, and to fence the said ten acres with a good rail fence by the 1st of October next; and the defendant below agreed to pay the plaintiff at the rate of eight dollars per acre, part to be paid in oxen, &c., and then averred performance.

The second count was a general *indebitatus assumpsit* for work and labor. The defendant pleaded the general issue, and the jury found a special verdict; namely, "That the plaintiff, in pursuance of the contract and agreement mentioned in the first count, did partly clear the land in that count mentioned, but made none of the fence; and then, of his own accord, default, and negligence, and without any fault, default, or consent of the defendant, abandoned and gave up all further proceedings towards fulfilling the said contract, and hath not yet finished or fulfilled what he undertook to perform by the said contract; and whether, under these

circumstances, it is competent and lawful for the plaintiff to put an end to the said contract in the said first count mentioned, and proceed on a general count for work and labor, and to recover the value of what he did in pursuance of said contract, the jury are uninformed, and pray the advice of the court," etc.; and they assessed the plaintiff's damages, on the second count of the declaration, at fifty dollars. The court below gave judgment for the plaintiff, and the cause was submitted to this court without argument.

SPENCER, J., delivered the opinion of the court.

This case does not present the question whether, on a failure to prove the special contract, in consequence of a variance between the declaration and the proof, the plaintiff may not resort to the general count; but the point is, whether a party who enters into a contract and performs part of it, and then, without cause or the agreement or fault of the other party, but of his own mere volition, abandons the performance, can maintain an action on an implied assumpsit for the labor actually performed; and it seems to me that the mere statement of the case shows the illegality and injustice of the claim.

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There are two principles, which are considered well established, precluding the plaintiff below from recovering: 1st, The contract is open between the parties, and still in force; the defendant below has done no act to dissolve or rescind it; and it was decided in *Raymond and others v. Bernard*,¹ upon a review of all the cases, that if the special agreement was still in force the plaintiff could not resort to the general counts. 2d. The contract being entire, performance by the plaintiff below was a condition precedent, and he was bound to show a full and substantial performance of his part of the contract; this was so decided in *McMillan v. Vanderlip*.² In *Cutter v. Powell*,³ a sailor hired for a voyage took a promissory note from his employer for thirty guineas, provided he proceeded, continued, and did his duty as second mate, from Kingston to Liverpool. Before the arrival of the ship he died; and the court held that wages could not be recovered either on the contract or on a *quantum meruit*. The decision was founded on common-law principles. Lord KENYON said that where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law. ASHURST, J., very pertinently observed, this is a written contract, and speaks for itself; and as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it; that the plaintiff had no right to desert the agreement and recover on a quantum meruit; for wherever there is an express contract the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage.

¹ 12 Johns. 274.

² 12 Johns. 166.

³ 6 T. R. 320.

The case of *Faxon v. Mansfield & Holbrook*¹ is directly in point. Mansfield agreed with Holbrook to erect and finish a barn by a fixed day, when he was to receive 400 dollars in full compensation; he performed part of the work, and left it unfinished, without the consent and contrary to the wishes of Holbrook. PARSONS, C. J., in giving the opinion of the court, said, on these facts, Mansfield could maintain no action, either on his contract or on a *quantum meruit*, against Holbrook; his failure arising not from inevitable accident, but his own neglect.

In *Whiting v. Sullivan*,² PARSONS, C. J., said, "As the law will not imply a promise where there was an express promise, so the law will not imply a promise of any person against his own express declaration."

In *Linningdale v. Livingston*³ we recognized a position in Buller's *Nisi Prius*, "that if there be a special agreement, and the work be done, but not in pursuance of it, the plaintiff may recover upon a *quantum meruit*; for otherwise he would not be able to recover at all." This observation has misled the court below. Correctly understood, it has no application here. It supposes a performance of the contract, with variations from the agreement, probably with the assent of both parties; or it may mean an extension of the time within which the agreement was to be performed, with the like assent. The position never was intended to embrace the case of a wilful dereliction of the contract when partly executed, by one of the parties, without the assent and against the will of the other.⁴

Judgment reversed.

JOHN STARK v. THOMAS PARKER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1824.

[Reported in 2 *Pickering*, 267.]

THIS was an action of *indebitatus assumpsit* brought to recover the sum of \$27.33, as a balance due for services rendered by the plaintiff on the defendant's farm. Plea, the general issue.

At the trial in the Court of Common Pleas before STRONG, J., the defendant admitted that the plaintiff had performed the service set forth in the declaration, and for the price therein stated, and that he, the defendant, had paid him from time to time, before he left the defendant's service, money amounting in the whole to about \$36, and on account of his labor, but the plaintiff proved that the plaintiff agreed to work for him a year for the sum of \$120, and that he, the defendant, agreed to pay him that

¹ 2 Mass. 147.

² 7 Mass. 109.

³ 10 Johns. 36.

⁴ It was held in *Lantry v. Parks*, 8 Cow. 63, that a plaintiff who without cause left his employment, but who offered to return two days later, could not recover on a *quantum meruit*, the defendant refusing to receive him back. — ED.

sum for his labor. He also proved that the plaintiff voluntarily left his service before the expiration of the year, and without any fault on the part of the defendant, and against his consent.

The judge thereupon instructed the jury, that the plaintiff would be entitled to recover in this action a sum in proportion to the time he had served, deducting therefrom such sum, if any, as the jury might think the defendant had suffered by having his service deserted; and if such sum should exceed the sum claimed by the plaintiff, they might find a verdict for the defendant.

The jury having returned a verdict for the plaintiff, the defendant filed his exceptions to this instruction.

The court now called on the counsel for the plaintiff to begin, as he was to contend for what seemed to be a new principle.

H. H. Fuller for the plaintiff.

B. Sumner for the defendant.

LINCOLN, J., delivered the opinion of the court. This case comes before us upon exceptions filed, pursuant to the statute, to the opinion in matter of law of a judge of the Court of Common Pleas, before whom the action was tried by a jury; and we are thus called upon to revise the judgment which was there rendered. The exceptions present a precise abstract question of law for consideration, namely, whether upon an entire contract for a term of service for a stipulated sum, and a part performance, without any excuse for neglect of its completion, the party guilty of the neglect can maintain an action against the party contracted with, for an apportionment of the price, or a *quantum meruit*, for the services actually performed. Whatever may be the view properly taken of the contract between the parties in the case at bar, the point upon which it was ruled in the court below embraced but this single proposition. The direction to the jury was, "that although proved to them that the plaintiff agreed to serve the defendant for an agreed price for a year, and had voluntarily left his service before the expiration of that time, and without the fault of the defendant, and against his consent, still the plaintiff would be entitled to recover of the defendant, in this action, a sum in proportion to the time he had served, deducting therefrom such sum (if any) as the jury might think the defendant had suffered by having his service deserted." If this direction was wrong, the judgment must be reversed, and the case sent to a new trial, in which the diversity of construction given to the character and terms of the contract by the counsel for the respective parties may be a subject for distinct consideration.

It cannot but seem strange to those who are in any degree familiar with the fundamental principles of law, that doubts should ever have been entertained upon a question of this nature. Courts of justice are eminently characterized by their obligation and office to enforce the performance of contracts, and to withhold aid and countenance from those who seek,

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through their instrumentality, impunity or excuse for the violation of them. And it is no less repugnant to the well established rules of civil jurisprudence, than to the dictates of moral sense, that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation for services under it. The true ground of legal demand in all cases of contracts between parties is, that the party claiming has done all which on his part was to be performed by the terms of the contract, to entitle him to enforce the obligation of the other party. It is not sufficient that he has given to the party contracted with, a right of action against him. The ancient doctrine on this subject, which was carried to such an absurd extent as to allow an action for the stipulated reward for a specified service, under a total neglect of performance, leaving the other party to his remedy for this neglect, by an action in turn, has been long since wisely exploded, and the more reasonable rule before stated, in late decisions is clearly established.

Upon examining the numerous authorities, which have been collected with great industry by the counsel for the plaintiff, it will be found that a distinction has been uniformly recognized in the construction of contracts, between those in which the obligation of the parties is reciprocal and independent, and those where the duty of the one may be considered as a condition precedent to that of the other. In the latter cases, it is held, that the performance of the precedent obligation can alone entitle the party bound to it, to his action. Indeed the argument of the counsel in the present case has proceeded entirely upon this distinction, and upon the *petitio principii* in its application. It is assumed by him, that the service of the plaintiff for a year was not a condition precedent to his right to a proportion of the stipulated compensation for that entire term of service, but that upon a just interpretation of the contract, it is so far divisible, as that consistently with the terms of it the plaintiff, having labored for any portion of the time, may receive compensation *pro tanto*. That this was the intention of the parties is said to be manifest from the fact found in the case, that the defendant from time to time did in fact make payments expressly toward this service. We have only to observe upon this point in the case, that however the parties may have intended between themselves, we are to look to the construction given to the contract by the court below. The jury were not instructed to inquire into the meaning of the parties in making the contract. They were instructed, that if the contract was entire, in reference alike to the service and the compensation, still by law it was so divisible in the remedy, that the party might recover an equitable consideration for his labor, although the engagement to perform it had not been fulfilled. The contract itself was not discharged; it was considered as still subsisting, because the loss sustained by the defendant in the breach of it was to be estimated in the assessment of damages to

the plaintiff. A proposition apparently more objectionable in terms can hardly be stated, and if supported at all it must rest upon the most explicit authority. The plaintiff sues in *indebitatus assumpsit* as though there was no special contract, and yet admits the existence of the contract to affect the amount he shall recover. The defendant objects to the recovery of the plaintiff the express contract which has been broken, and is himself charged with damages for the breach of an implied one which he never entered into. The rule that *expressum facit cessare tacitum* is as applicable to this, as to every other case. If the contract is entire and executory, it is to be declared upon. Where it is executed and a mere duty to pay the stipulated compensation remains, a general count for the money is sufficient. Numerous instances are indeed to be found in the books, of actions being maintained where the specific contract has not been executed by the party suing for compensation; but in every case it will be seen that the precise terms of the contract have been first held, either to have been expressly or impliedly waived, or the non-execution excused upon some known and settled principle of law. Such was the case in *Burn v. Miller*,¹ *Thorpe v. White et al.*,² and in most of the cases cited by the plaintiff's counsel, in which the decision was had upon considering the obligation of the party to execute the contract, and not upon the construction of the contract itself. Nothing can be more unreasonable than that a man, who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act, and we are satisfied that the law will not allow it.

That such a contract as is supposed in the exceptions before us expresses a condition to be performed by the plaintiff precedent to his right of action against the defendant, we cannot doubt. The plaintiff was to labor one year for an agreed price. The money was to be paid in compensation for the service, and not as a consideration for an engagement to serve. Otherwise, as no precise time was fixed for payment, it might as well be recovered before the commencement of the labor or during its progress, as at any subsequent period. While the contract was executory and in the course of execution and the plaintiff was in the employ of the defendant, it would never have been thought an action could be maintained for the precise sum of compensation agreed upon for the year. The agreement of the defendant was as entire on his part to pay, as that of the plaintiff to serve. The latter was to serve one year, the former to pay \$120. Upon the construction contended for by the plaintiff's counsel, that the defendant was to pay for any portion of the time in which the plaintiff should labor, in the same proportion to the whole sum which the time of labor done should bear to the time agreed for, there is no rule by which the defendant's liability can be determined. The plaintiff might as well claim his wages by the month as by the year, by the week as by the month, and

¹ 4 Taunt. 744.² 13 Johns. 53.

by the day or hour as by either. The responsibility of the defendant would thus be affected in a manner totally inconsistent with the terms of his agreement to pay for a year's service in one certain and entire amount. Besides, a construction to this effect is utterly repugnant to the general understanding of the nature of such engagements. The usages of the country and common opinion upon subjects of this description are especially to be regarded, and we are bound judicially to take notice of that which no one is in fact ignorant. It may be safe to affirm, that in no case has a contract in the terms of the one under consideration, been construed by practical men to give a right to demand the agreed compensation before the performance of the labor, and that the employer and employed alike universally so understand it. The rule of law is in entire accordance with this sentiment, and it would be a flagrant violation of the first principles of justice to hold it otherwise.

The performance of a year's service was, in this case, a condition precedent to the obligation of payment. The plaintiff must perform the condition, before he is entitled to recover anything under the contract, and he has no right to renounce his agreement and recover upon a *quantum meruit*. The cases of *M'Millan v. Vanderlip*,¹ *Jennings v. Camp*,² and *Reab v. Moor*,³ are analogous in their circumstances to the case at bar, and are directly and strongly in point. The decisions in the English cases express the same doctrine: *Waddington v. Oliver*,⁴ *Ellis v. Hamlen*,⁵ and the principle is fully supported by all the elementary writers.

But it has been urged, that whatever may be the principle of the common law, and the decisions in the courts in New York on this subject, a different rule of construction has been adopted in this Commonwealth, and we are bound to believe that such has sometimes been the fact, from the opinion of the learned and respectable judge who tried this cause, and from instances of similar decisions cited at the bar, but not reported. The occasion of so great a departure from ancient and well-established principles cannot well be understood. It has received no sanction at any time from the judgment of this court within the periods of our reports. As early as the second volume of Massachusetts Reports, in the case of *Faxon v. Mansfield*, the common-law doctrine in relation to dependent covenants was recognized and applied, and in several subsequent cases it has been repeatedly and uniformly adhered to. The law, indeed, is most reasonable in itself. It denies only to a party an advantage from his own wrong. It requires him to act justly by a faithful performance of his own engagements, before he exacts the fulfilment of dependent obligations on the part of others. It will not admit of the monstrous absurdity, that a man may voluntarily and without cause violate his agreement, and make the very breach of that agreement the foundation of an action which he could not

¹ 12 Johns. 165.² 13 Johns. 94.³ 19 Johns. 337.⁴ 2 New Rep. 61.⁵ 3 Taunt. 52.

maintain under it. Any apprehension that this rule may be abused to the purposes of oppression, by holding out an inducement to the employer, by unkind treatment near the close of a term of service, to drive the laborer from his engagement, to the sacrifice of his wages, is wholly groundless. It is only in cases where the desertion is voluntary and without cause on the part of the laborer, or fault or consent on the part of the employer, that the principle applies. Wherever there is a reasonable excuse, the law allows a recovery. To say that this is not sufficient protection, that an excuse may in fact exist in countless secret and indescribable circumstances, which from their very nature are not susceptible of proof, or which, if proved, the law does not recognize as adequate, is to require no less than that the law should presume what can never legally be established, or should admit that as competent which by positive rules is held to be wholly immaterial. We think well established principles are not thus to be shaken, and that in this Commonwealth more especially, where the important business of husbandry leads to multiplied engagements of precisely this description, it should least of all be questioned, that the laborer is worthy of his hire, only upon the performance of his contract, and as the reward of fidelity.

The judgment of the Court of Common Pleas is reversed, and a new trial granted at the bar of this court.

NATHAN HAYWARD v. ARZA LEONARD.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1828.

[*Reported in 7 Pickering, 181.*]

THIS was an action of assumpsit. The first count was on a conditional promissory note, to be void if the plaintiff failed to perform an agreement of the same date with the note, by which the plaintiff, for the sum named in the note, contracted to erect for the defendant on his land, by a certain day, a house of a certain size, and to be built in a specified manner; this count averred that the house was built pursuant to the contract. Another count was for work done and materials found, and upon a *quantum meruit* for building a house on the defendant's land at his request. The declaration also contained the common money counts, and counts upon two other promissory notes.

On the trial before MORRIS, J., on the general issue, it appeared that the plaintiff erected a house upon the defendant's land, within the time and of the dimensions stated in the contract, but that in workmanship and in materials it was not according to the terms of the agreement.

It appeared that the defendant, who lived near the place where the house was erected, after the date of the contract had requested the plain-

tiff to begin the house which he had agreed to build; that during the progress of the work the defendant visited the place almost every day, and sometimes oftener, and had an opportunity to see all the materials as they were used, and all the work as it was done; that he objected to parts of the work as it was done, and especially to the clapboards, as not being according to the contract; that after this he continued to give directions about the house, and particularly directed some variations from the contract. With much of the work, he from time to time expressed himself to be satisfied, but almost always declaring at the same time that he was unacquainted with, and no judge of such work. Soon after the house was done the defendant refused to accept it. But there was no evidence tending to show that the defendant, in any way, informed the plaintiff, or that the plaintiff had any knowledge, that the defendant did not intend to accept the house, till after it was finished.

The plaintiff's counsel admitted that he had not fulfilled his contract. But they offered evidence of the value of the house when completed; and contended, that the defendant having become the owner of the house, and having permitted and encouraged the plaintiff to proceed in finishing the house after he (the defendant) had discovered that it was not according to contract, the plaintiff might waive the first count, and recover upon the others the value of the house. This evidence was objected to by the defendant's counsel, but admitted.

The defendant afterwards gave in evidence three receipts for money paid by him to the plaintiff, one being towards the payment of the conditional note, before the commencement of the house; the others, on account of the two other notes, which they exceeded by twenty-three dollars.

In order to reserve the question of law for the whole court, the judge instructed the jury to find a verdict for the plaintiff for the sum which in their opinion the house was worth to the defendant when it was completed, deducting the twenty-three dollars and the other payments made by the defendant.

The jury returned a verdict for 644 dollars 76 cents.

To the above orders and instructions the defendant excepted. If they were right, judgment was to be entered according to the verdict; if wrong, a new trial was to be granted, and such other orders made as the court should think right.

Baylies for the defendant.

Eddy and Beal for the plaintiff.

The opinion of the court was afterward drawn up by

PARKER, C. J. In this case there is a great array of authorities on both sides, from which it appears very clearly that different judges and different courts have held different doctrines, and sometimes the same court at different times. The point in controversy seems to be this; whether when a party has entered into a special contract to perform work for another, and

to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet nevertheless the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labor done, and on a *quantum valebant* for the materials. We think the weight of modern authority is in favor of the action, and that upon the whole it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another, shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed, and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitably rented, — there having been no prohibition to proceed in the work after a deviation from the contract has taken place, — no absolute rejection of the building, with notice to remove it from the ground; it would be a hard case indeed if the builder could recover nothing.

And yet he certainly ought not to gain by his fault in violating his contract, as he may, if he can recover the actual value; for he may have contracted to build at an under price, or the value of such property may have risen since the contract was entered into. The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the price good, deducting the loss or damage occasioned by the variation from the contract. As in the case of Smith against the proprietors of a meeting-house in Lowell, determined at March term, 1829, in Suffolk.

The cases cited from our own books, which are supposed to militate against this doctrine, are not of that character.

In the case of Faxon v. Mansfield, and Holbrook his Trustee,¹ it was decided that Holbrook owed Mansfield nothing, because Mansfield, having contracted to build a barn, voluntarily left it unfinished, and the sum remaining unpaid was not more than sufficient to pay for the labor necessary to finish it.

In the case of Taft v. The Inhabitants of Montagne,² the bridge was so built as to be useless, and there was no evidence that the materials came to the hands of the defendants.

In the case of Stark v. Parker,³ the plaintiff was not allowed to recover on a *quantum meruit*, because he had stipulated to labor for a year, and before the expiration of the time, voluntarily and without fault of Parker, left his service.

These are very different from cases like the present, where the contract is performed, but, without intention, some of the particulars of the contract are deviated from.

¹ 2 Mass. 147.

² 14 Mass. 282.

³ 2 Pick. 267.

It is laid down as a general position in Buller's *Nisi Prius*, 139, that if a man declare upon a special contract and upon a *quantum meruit*, and prove the work done but not according to the contract, he may recover on the *quantum meruit*, for otherwise he would not be able to recover at all. Mr. Dane¹ disputes this doctrine, and thinks it cannot be law unless the imperfect work be accepted. Buller makes no such qualification; and yet it would seem to be reasonable that if the thing contracted for was a chattel, the party for whom it was made ought not to be held to take it and pay for it, unless it is made according to the contract, as a ship, a carriage, etc.; and this principle seems to be of common use in regard to articles of common dealing, such as wearing apparel, tools and implements of trade, ornamental articles, furniture, etc. There seems to be, however, ground for distinction in the case of buildings erected upon the soil of another, for in such case the owner of the land necessarily becomes owner of the building. The builder has no right to take down the building, or remove the materials; and though the owner may at first refuse to occupy, he or his heirs or assignees will eventually enjoy the property. And in such cases the doctrine of Buller is certainly not unreasonable. The case put by Buller to illustrate his position is that of a house built on contract, but, not according to it.

Mr. Dane's reasoning is very strong in the place above cited, and subsequently in Vol. 2, p. 45, to show that the position of Buller, in an unlimited sense, cannot be law; and some of the cases he puts are decisive in themselves. As if a man who had contracted to build a brick house, had built a wooden one, or instead of a house, the subject of the contract, had built a barn. In these cases, if such should ever happen, the plaintiff could recover nothing without showing an assent or acceptance, express or implied, by the party with whom he contracted. Indeed such gross violations of contract could not happen without fraud, or such gross folly as would be equal to fraud in its consequences. When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valebant*, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence may be exceptions.

In looking at the evidence reported in this case, we see strong grounds for an inference that the defendant waived all exceptions to the manner in which the work was done. He seems to have known of the deviations from the contract; directed some of them himself; suffered the plaintiff to go on with his work; made no objection when it was finished, nor until he was called on to pay. But the case was not put to the jury on the ground of acceptance or waiver, but merely on the question, whether the house was built pursuant to the contract or not; and if not, the jury were directed to

¹ Vol. I. p. 223.

consider what the house was worth to the defendant, and to give that sum in damages. We think this is not the right rule of damages ; for the house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price as the house was worth less on account of these departures.

And upon this ground only a new trial is granted.

BRITTON v. TURNER.

IN THE SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE, JULY
TERM, 1834.

[Reported in 6 *New Hampshire Reports*, 481.]

ASSUMPSIT for work and labor performed by the plaintiff, in the service of the defendant, from March 9, 1831, to December 27, 1831.

The declaration contained the common counts, and among them a count in *quantum meruit* for the labor, averring it to be worth \$100.

At the trial in the C. C. Pleas, the plaintiff proved the performance of the labor as set forth in the declaration.

The defence was that it was performed under a special contract, — that the plaintiff agreed to work one year, from some time in March, 1831, to March, 1832, and that the defendant was to pay him for said year's labor the sum of \$120 ; and the defendant offered evidence tending to show that such was the contract under which the work was done.

Evidence was also offered to show that the plaintiff left the defendant's service without his consent, and it was contended by the defendant that the plaintiff had no good cause for not continuing in his employment.

There was no evidence offered of any damage arising from the plaintiff's departure, farther than was to be inferred from his non-fulfilment of the entire contract.

The court instructed the jury, that if they were satisfied from the evidence that the labor was performed, under a contract to labor a year, for the sum of \$120, and if they were satisfied that the plaintiff labored only the time specified in the declaration, and then left the defendant's service, against his consent and without any good cause, yet the plaintiff was entitled to recover, under his *quantum meruit* count, as much as the labor he performed was reasonably worth ; and under this direction the jury gave a verdict for the plaintiff for the sum of \$95.

The defendant excepted to the instructions thus given to the jury.

Henderson for the defendant.

Wilson for the plaintiff.

PARKER, J., delivered the opinion of the court.

It may be assumed, that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of \$120, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances recover a reasonable sum for the service he has actually performed, under the count in *quantum meruit*.

Upon this, and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfil the contract by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed, however much he may have done towards the performance; and this has been considered the settled rule of law upon this subject.

Stark v. Parker;¹ Faxon v. Mansfield;² McMillen v. Vanderlip;³ Jennings v. Camp;⁴ Reab v. Moor;⁵ Lantry v. Parks;⁶ Sinclair v. Bowles;⁷ Spain v. Arnott.⁸

That such rule in its operation may be very unequal, not to say unjust, is apparent.

A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non-performance, which in many instances may be trifling; whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance — although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage — is in fact subjected to a loss of all which has been performed, in the nature of damages for the non-fulfilment of the remainder, upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation.

By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and

¹ 2 Pick. 267.

⁴ 13 Johns. 94.

⁷ 9 B. & C. 92.

² 2 Mass. 147.

⁵ 19 Johns. 337.

⁸ 2 Stark. N. P. 256.

³ 12 Johns. 165.

⁶ 8 Cow. 63.

more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is \$95, if the defendant can succeed in this defence he in fact receives nearly five sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff, a sum not only utterly disproportionate to any probable, not to say possible, damage which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfilment of his contract.

Another illustration is furnished in *Lantry v. Parks*.¹ There the defendant hired the plaintiff for a year, at \$10 per month. The plaintiff worked ten and a half months, and then left, saying he would work no more for him. This was on Saturday; on Monday the plaintiff returned, and offered to resume his work, but the defendant said he would employ him no longer. The court held that the refusal of the plaintiff on Saturday was a violation of his contract, and that he could recover nothing for the labor performed.

There are other cases, however, in which principles have been adopted leading to a different result.

It is said, that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth. 2 Stark. Ev. 97, 98; *Hayward v. Leonard*;² *Smith v. First Congregational Meeting House in Lowell*;³ *Jewell v. Schroepel*;⁴ *Hayden v. Madison*;⁵ Bull. N. P. 139; 4 Bos. & Pul. 355; 10 Johns. 36; 13 Johns. 97; 7 East, 479.

A different doctrine seems to have been holden in *Ellis v. Hamlen*,⁶ and it is apparent, in such cases, that if the house has not been built in the manner specified in the contract, the work has not been done. The party has no more performed what he contracted to perform, than he who has contracted to labor for a certain period, and failed to complete the time.

It is in truth virtually conceded in such cases that the work has not been done, for if it had been, the party performing it would be entitled to recover upon the contract itself, which it is held he cannot do.

¹ 8 Cow. 83.

² 7 Pick. 181.

³ 8 Pick. 178.

⁴ 4 Cow. 564.

⁵ 7 Green, 78.

⁶ 3 Taunt. 52.

Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it, — elect to take no benefit from what has been performed; and therefore if he does receive, he shall be bound to pay the value; whereas in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract under an expectation that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them.

The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term.

If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house.

Where goods are sold upon a special contract as to their nature, quality, and price, and have been used before their inferiority has been discovered, or other circumstances have occurred which have rendered it impracticable or inconvenient for the vendee to rescind the contract *in toto*, it seems to have been the practice formerly to allow the vendor to recover the stipulated price, and the vendee recovered by a cross action damages for the breach of the contract. “But according to the later and more convenient practice, the vendee in such case is allowed, in an action for the price, to give evidence of the inferiority of the goods, in reduction of damages, and the plaintiff who has broken his contract is not entitled to recover more than the value of the benefits which the defendant has actually derived from the goods; and where the latter has derived no benefit, the plaintiff cannot recover at all.” 2 Stark. Ev. 640, 642; *Okell v. Smith*.¹

So where a person contracts for the purchase of a quantity of merchandise, at a certain price, and receives a delivery of part only, and he keeps that part, without any offer of a return, it has been held that he must pay

¹ 1 Stark. N. P. 107.

the value of it. *Shipton v. Casson*; ¹ *Baker v. Sutton*; ² 1 Camp. 55, note.

A different opinion seems to have been entertained: *Waddington v. Oliver*,³ and a different decision was had. *Walker v. Dixon*.⁴

There is a close analogy between all these classes of cases, in which such diverse decisions have been made.

If the party who has contracted to receive merchandise, takes a part and uses it, in expectation that the whole will be delivered, which is never done, there seems to be no greater reason that he should pay for what he has received, than there is that the party who has received labor in part, under similar circumstances, should pay the value of what has been done for his benefit.

It is said that in those cases where the plaintiff has been permitted to recover there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period, the party for whom the labor is done in truth stipulates to receive it from day to day, as it is performed, and although the other may not eventually do all he has contracted to do, there has been, necessarily, an acceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract that there was to be such acceptance.

If then the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed.

In neither case has the contract been performed. In neither can an action be sustained on the original contract.

In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished.

We have no hesitation in holding that the same rule should be applied to both classes of cases, especially as the operation of the rule will be to make the party who has failed to fulfil his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. 1 Saund. 320, c; 2 Stark. Ev. 643.

It is as "hard upon the plaintiff to preclude him from recovering at all, because he has failed as to part of his entire undertaking," where his con-

¹ 5 B. & C.

² Com. Dig. Action F.

³ 5 B. & P. 61.

⁴ 2 Stark. N. P. 281.

tract is to labor for a certain period, as it can be in any other description of contract, provided the defendant has received a benefit and value from the labor actually performed.

We hold then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it, and where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties.

In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done, or furnished, and upon the whole case derives a benefit from it. *Taft v. Montague*; ¹ 2 Stark. Ev. 644.

But if, where a contract is made of such a character, a party actually receives labor, or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant."²

If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law cannot and ought not to raise an implied promise to pay. But where the party receives value, — takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. *Farnsworth v. Garrard*.³ And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him

¹ 14 Mass. 282.

² 1 Dane's Abr. 224.

³ 1 Camp. 38.

from rejecting it afterwards, that does not alter the case, — it has still been received by his assent.

In fact we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that the contract being entire there can be no apportionment; and that there being an express contract no other can be implied, even upon the subsequent performance of service, — is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is that the hired laborer shall be entitled to compensation for the service actually performed, though he does not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary.

Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect. *Boone v. Eyre*; ¹ *Campbell v. Jones*; ² *Ritchie v. Atkinson*; ³ *Burn v. Miller*.⁴

It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretence for a recovery if he voluntarily deserts the service before the expiration of the time.

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth, or the amount of advantage he receives upon the whole transaction: *Wadleigh v. Sutton*; ⁵ and, in estimating the value of the labor, the contract price for the service cannot be exceeded. *7 Green. 78*; *Dubois v. Delaware & Hudson Canal Company*; ⁶ *Koon v. Greenman*.⁷

If a person makes a contract fairly he is entitled to have it fully performed, and if this is not done he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the non-performance.

The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defence he is entitled to do so, and the implied promise which the law will raise in such case, is to pay such amount of the stipulated price for the whole labor as remains, after deducting what it would cost to procure a completion of the residue

¹ 1 H. Bl. 273, n.

² 6 D. & E. 570.

³ 10 East, 295.

⁴ 4 Taunt. 745.

⁵ 6 N. H. 15.

⁶ 4 Wend. 285.

⁷ 7 Wend. 121.

of the service, and also any damage which has been sustained by reason of the non-fulfilment of the contract.

If in such case it be found that the damages are equal to, or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract, has not upon the whole case received a beneficial service, the plaintiff cannot recover.

This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason; and it will in most instances settle the whole controversy in one action, and prevent a multiplicity of suits and cross actions.

There may be instances, however, where the damage occasioned is much greater than the value of the labor performed, and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance, whatever they may be. *Crowninshield v. Robinson*.¹

And he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him; but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot afterwards sustain an action for farther damages.²

Applying the principles thus laid down to this case, the plaintiff is entitled to judgment on the verdict.

The defendant sets up a mere breach of the contract in defence of the action, but this cannot avail him. He does not appear to have offered evidence to show that he was damnified by such breach, or to have asked that a deduction should be made upon that account. The direction to the jury was therefore correct, that the plaintiff was entitled to recover as much as the labor performed was reasonably worth, and the jury appear to have allowed a *pro rata* compensation, for the time which the plaintiff labored in the defendant's service.

As the defendant has not claimed or had any adjustment of damages, for the breach of the contract, in this action, if he has actually sustained damage he is still entitled to a suit to recover the amount.

Whether it is not necessary, in cases of this kind, that notice should be given to the employer that the contract is abandoned, with an offer of adjustment and demand of payment; and whether the laborer must not wait until the time when the money would have been due according to the

¹ 1 Mason.

² *Mondel v. Steele*, 8 M. & W. 858, *contra*. — Ed.

contract, before commencing an action,¹ are questions not necessary to be settled in this case, no objections of that nature having been taken here.

*Judgment on the verdict.*²

CHAMPLIN v. ROWLEY.

IN THE COURT FOR THE CORRECTION OF ERRORS OF NEW YORK, DECEMBER, 1837.

[*Reported in 18 Wendell, 187.*]

ERROR from the Supreme Court. Champlin sued Rowley in an action of assumpsit, and declared on the common counts for goods and chattels and hay sold and delivered. On the trial of the cause it appeared that on 12th September, 1831, a contract was entered into by the parties, whereby the plaintiff agreed to deliver to the defendant, at a certain dock in Rhinebeck in Dutchess county, 100 tons of hay, and as much more beyond that quantity as he had to spare, to be delivered pressed, between the day of the date of the contract and the last run of the sloops navigating the river ; for which the defendant agreed to pay at the rate of three shillings and six pence per cwt., — \$100 to be paid in advance, and the residue when the whole quantity should be delivered. The defendant paid the \$100 advance. The plaintiff commenced the delivery of hay on 25th October, 1831, and delivered more or less every week until the river closed on the 9th December, when the whole quantity of hay delivered amounted only to 52 tons and 900 wt. The ordinary time of the closing of the river at Rhinebeck is from 20th to 30th December. The defendant, in pursuance of a notice attached to his plea, offered to prove, that after the making of the contract the price of hay rose in the market to eight shillings, and from that to ten shillings per cwt., and that had the plaintiff performed his contract, the net profits which the defendant would have made upon the hay undelivered would have exceeded the sum claimed by the plaintiff for the quantity delivered ; and he further offered to prove that he hired a storehouse in the city of New York for the reception of the hay, at a rent of \$90, which he had been obliged to pay, and in consequence of the non-performance of

¹ 5 B & P. 61.

² Whatever might be the views of the court as at present organized, in a case like that of *Britton v. Turner*, and however much, even, some may think it is to be regretted that the rule of law there laid down was allowed to obtain, still, considering that it has remained as the law of the State for nearly twenty years, and has never been overruled, and that while it has the strong feature of its direct tendency to the wilful and careless violation of express contracts fairly entered into, to lead to its condemnation and disapproval, it has also some features of advantage and strong justice to recommend it. We, on the whole, are not inclined to disturb the doctrines of that case, but to adopt and apply them. Woods, C. J., in *Davis v. Barrington*, 30 N. H. 517, 529. — Ed.

the contract by the plaintiff, the storehouse had been unoccupied and of no use to him: which evidence was objected to by the plaintiff and rejected by the judge. The defendant insisted that the plaintiff was not entitled to recover, 1. because he had failed in performance of the contract on his part; and 2. that at all events he could not recover under the common counts. The judge ruled that the defendant having received a partial benefit, the action lay without showing a full performance on the part of the plaintiff, and that a recovery might be had under the common counts; and he accordingly directed the jury that the plaintiff was entitled to their verdict for the value of the hay delivered at the contract price, deducting the \$100 paid, with the interest of the balance from 9th December, when the river closed. The jury found a verdict for the plaintiff for \$386.64. The defendant made a case and applied to the Supreme Court for a new trial, which was granted. See opinion of court, 13 Wendell, 260. On the application of the plaintiff, to enable him to sue out a writ of error, the rule granting a new trial was vacated and judgment was entered for the defendant. The case was then, by agreement of the parties, turned into a special verdict, by which the jury were represented to find the contract as above stated, the payment of the advance of \$100, the delivery of the 52 tons and 900 wt., and the closing of the navigation on the 9th December. The jury were also represented to find "that after the making of the contract and in the course of the ensuing winter the price of hay rose in the market to eight shillings, and from that sum to ten shillings per cwt.;" and the hiring of the store in New York, and the consequent loss to the defendant, were also set forth. A record being made up incorporating the special verdict, and rendering judgment thereon for the defendant, the plaintiff sued out a writ of error, removing the record into this court.

S. Stevens for the plaintiff in error.

J. L. Wendell for the defendant in error.

After advisement, the following opinion was delivered

By the CHANCELLOR. This is an action to recover compensation for the value of hay delivered in part performance of a contract to deliver a larger quantity, and to be paid for when the whole was delivered. From the facts stated in the special verdict there is no doubt that the non-performance of the contract in full has never been waived by any act of the defendant; and it is also very probable from the facts stated in the special verdict that he must have sustained considerable damage by the non-delivery of the residue of the hay according to the contract. It is not found by the verdict that the plaintiff offered to deliver the residue of the hay after the time specified in the agreement, or that he ever requested the defendant to return the hay which had been actually delivered. Neither was that necessary, if some of the recent cases in England on this subject can be considered as law in this State. In *Oxendale v. Witherall*,¹ it was held that the

¹ 9 B. & C. 386.

party who had failed to perform his contract could recover against the other, who had not been in fault, for the wheat delivered in part performance of his agreement, unless the defendant had returned the wheat delivered. This decision, carried to the extent it was in that case, cannot be considered as good law anywhere ; for it is not founded upon any equitable principle, and is contrary not only to justice, but also to common sense. The only way I can account for it is upon the supposition that the facts of the case are not properly stated in the report ; or that the injustice of requiring the party who was not in fault to be at the expense of returning to the other party bulky articles of this description, or even of seeking him for the purpose of making an offer to return them to protect himself from an action, was not presented to the consideration of the court. Again : in that case, as in this, the contract was not to deliver the whole quantity at one time, but to deliver the whole within a certain specified period. Neither was there any agreement, either express or implied, that the defendant should not be permitted to sell or use the several parcels, delivered from time to time, until the latest period for completing the contract had actually expired. Here the contract was to deliver a large quantity of pressed hay upon the dock at Rhinebeck, between the twelfth of September and the closing of the navigation on the river ; from which it is fairly to be inferred that it was understood by both parties that it was to be transported from thence to the market where such an article as pressed hay was used, by water, and while the river remained open. The plaintiff, therefore, was not bound to take all the hay to the dock at once ; but the defendant, by his contract, was bound to receive it in reasonable parcels, as it was brought to the place appointed for the delivery within the time specified. *Lewis v. Weldon.*¹ Neither is it the sensible construction of this agreement that the defendant was to keep the fifty-two tons of hay on hand at Rhinebeck dock, until after the navigation closed, for the purpose of seeing whether the other party intended to perform his agreement as to the delivery of the residue. The idea of founding an action upon the neglect of the defendant to return the hay delivered in such a case, therefore, is not founded in good sense. And I confess I can see no ground for the distinction which has been established by the English cases, since the Revolution, between the part performance of a contract for labor and a partial performance of a contract for the delivery of specific articles under such an agreement as this. If the fifty-two tons of hay delivered under this contract were in New York at the time the navigation closed, as it may fairly be presumed they were, if the defendant had paid a reasonable attention to his own interest, or if the wheat in the case of *Oxendale v. Witherall* had been sold or converted into flour before the failure of the plaintiff to perform the residue of his contract, it would be about as unreasonable to require the defendant to return the hay to the plaintiff as it would be to return the fruits of

*There is no intention
of returning the hay
to the plaintiff.*

¹ 3 Rand. 71.

the labor of a man who had neglected to perform his contract for labor in full.

If any action can be sustained, in such a case, by the party who has failed to perform his contract, without any fault or acquiescence or waiver of a strict performance by the party who has received the benefit of the part performance, it must be upon the equitable principle recognized by the Supreme Court of New Hampshire in *Britton v. Turner*.¹ The principle adopted in the case referred to is, that it is unconscientious and inequitable for a party who has been actually benefited by the part performance of a contract, above or beyond the damages he has sustained by the non-performance of the residue of the agreement, to retain this excess of benefit without making the other party a compensation therefor; and that this excess of benefit arising from the part performance of the other party, forms a new consideration upon which the law implies a promise to pay for the same, and which excess of benefit, therefore, may be recovered in the equitable action of *assumpsit*. But if the nature of the part performance is such that the other party can reject the benefit received therefrom, as by offering to return specific articles received in part performance, but not actually converted or used, he is at liberty to do so, and to reserve his remedy for the non-performance of the contract. Courts of equity sometimes act upon a similar principle in relieving a party against a penalty or forfeiture arising from misfortune or the neglect of a party to perform his agreement; and perhaps in some cases it has been done where the forfeiture was incurred wilfully and intentionally, without any pretence of excuse arising from mistake or inability to perform. With the exception of this last class of cases, if courts of justice were at liberty to make new laws instead of administering those which are already in existence, and upon which the contract of the parties litigant are supposed to be founded, or if this was a new question upon which a court in this State was now to pass for the first time in settling a principle upon the flexibility of the common law as applied to new cases, I see no reasonable objection to the transferring these principles of the court of chancery to courts of common law, in cases of mere personal contracts, not founded upon agreements relative to the sale or transfer of an interest in real estate. But I consider this question as settled in this State, by a uniform course of decisions for the last twenty-five years, during which time the laws have undergone a most thorough revision by the legislature, without any attempt to change the law in this respect, as settled by the Supreme Court. I think it belongs, therefore, to the legislature, and not to this court, to make a change in the law in this respect, if such a change is deemed to be expedient and useful to the community. The only possible objection I can perceive to such a change is, that it may be a strong temptation to negligence in the performance of personal contracts, as the known practice of the court of chancery unques-

¹ 6 N. H. 492.

tionably is with respect to agreements for the sale or purchase of real property. The conclusion at which I have arrived on the question as to the plaintiff's right to recover at all in such a case, which was the principal question before the Supreme Court, entitles the defendant to a judgment upon this special verdict, upon the facts found thereby.

If the majority of the court agree with me in the conclusion at which I have arrived upon the first point, the judgment should be affirmed; but if they agree with me upon the last point,¹ and not upon the first, the writ of error should be dismissed; so that the plaintiff in error may seek his remedy, if he has any, by an application to the Supreme Court.

For the reasons before stated, I must vote for an affirmance of the judgment.

On the question being put, Shall this judgment be reversed? the members of the court divided as follows:—

In the affirmative: Senators BECKWITH, J. P. JONES, LOOMIS, PAIGE, SPRAKER, TALLMADE, WAGER, WILLES, WORKS—9.

In the negative: The PRESIDENT of the Senate, The CHANCELLOR, and Senators ARMSTRONG, J. BEARDSLEY, L. BEARDSLEY, DOWNING, EDWARDS, FOX, JOHNSON, H. F. JONES, LACY, McLEAN, POWERS, STERLING, TRACY, VAN DYCK—16.

Whereupon the judgment of the Supreme Court was affirmed.

CATLIN v. TOBIAS.

IN THE COURT OF APPEALS OF NEW YORK, MARCH TERM, 1863.

[Reported in 26 New York Reports, 217.]

APPEAL from the Supreme Court. The facts are sufficiently stated in the following opinion.

S. B. H. Judah for the appellant.

W. J. Street for the respondent.

EMOTT, J. This is an action for goods sold and delivered to the defendant by Daniel O. Ketchum and Charles H. Cole, who were partners, under the firm of D. O. Ketchum & Co. The answer, without denying the sale and delivery of the merchandise, denies any indebtedness for the same. It then proceeds to allege, as a separate defence, a contract between the defendant and D. O. Ketchum & Co., for the sale and delivery of certain glassware in quantities and at periods specified in the contract; by which contract Ketchum & Co., in the event of their failing to perform, were to forfeit to the defendant two hundred dollars. The answer goes on to aver that

¹ This point involved only a question of practice, and so much of the opinion as relates thereto has been omitted. — Ed.

D. O. Ketchum failed to deliver the glassware mentioned in the instrument; that the defendant has been damaged by such failure to the extent of two hundred dollars; that D. O. Ketchum & Co. have forfeited and become liable to pay to the defendant the two hundred dollars specified in their agreement, and the defendant claims to set off this amount against the plaintiff, who is the assignee of D. O. Ketchum & Co., and asks to have the complaint dismissed.

It will be observed that the answer admits the sale and delivery to the defendant of the goods for which the action is brought, while it does not allege that they were delivered under the contract which it sets up. It is doubtful whether the principal and more important question discussed on the argument of this appeal is raised by such an answer, but as it was evidently considered at the trial before the referee in the court below, and is presented by his report, I will proceed to discuss it.

The referee states in his report that on the 15th day of March, 1854, the defendant, who was a manufacturer of liniment, made a contract in writing with D. O. Ketchum & Co., who were vendors of glassware, by which they agreed to deliver to him bottles of various sizes for his medicine, at prices which were specified in the contract, and he agreed to take the glassware. Either party failing to perform was to forfeit or to pay \$200 to the other. The bottles were to be delivered during the months of April, May, and June next ensuing, and the kinds and quantities of bottles to be delivered during each month are specified in the agreement. The agreement is silent as to the time and manner of payment, although it was proved at the trial, without objection, that there was to be a credit of six months. It was also proved that after all the deliveries which the vendors actually made in April, 1854, the defendant gave them his note at six months for an amount which included the price of similar articles which had been sold and delivered to him before this agreement was made, and also a part of the price of the articles delivered in April after the contract. This note was dated April 13, 1854, and seems to have been subsequently paid, but the referee's report is silent in regard to it; nor is there evidence to show that there was any distinct understanding between the parties as to its precise consideration. On the 11th of April the referee finds that D. O. Ketchum & Co. delivered to the defendant sixty-four gross of two-ounce bottles, eighteen gross of ten-ounce bottles, and sixty-two gross of five-ounce bottles. The contract calls for one hundred gross of two-ounce bottles, and twelve gross of ten-ounce bottles, to be furnished in the month of April, but there is nothing in it as to the purchase or sale at any time of any five-ounce bottles. The referee finds that all the bottles thus delivered were received and used by the defendant. After this, on the 14th day of April, 1854, the firm of D. O. Ketchum & Co. was dissolved, and all the assets of the firm, including the contract with the defendant, and any and every claim against him, were assigned to D. O. Ketchum. A short time after this

D. O. Ketchum failed, and on the 10th of June, 1854, executed a general assignment for the benefit of his creditors to the plaintiff. No more bottles were delivered to the defendant after the 11th of April, and the residue of the agreement was not fulfilled by the vendors.

The plaintiff's assignors have, therefore, failed to perform their contract, and assuming, as the referee has done, that all the articles delivered by them to the defendant, of the description specified and called for by the agreement, were delivered under and in performance of it, the question arises whether, upon such a part performance, payment can be recovered for the price or value of the articles thus delivered. The referee held that the defendant was liable to pay for the glass delivered after the making of the agreement, notwithstanding it was not delivered in pursuance of its terms. He did not, however, find or report that the defendant waived the performance of the contract, but only that he accepted and used the articles delivered. He also decided that the defendant's claim for damages for the non-delivery of the glass could not be set up under the pleadings and proof in this action against the plaintiff. To these decisions the defendant excepted.

It will be seen that sixty-two gross of five-ounce bottles were delivered by D. O. Ketchum & Co. to the defendant on the 11th of April, which were not called for by the contract. The report of the referee states that these "were not at all within the contract," which may probably be fairly construed to mean that they were not delivered or received in pursuance of the contract, or as part of the deliveries under it. If this be so, and this finding is not objected to by either party, there can be no reason why the plaintiff should not recover the value of these articles, as upon a separate and distinct sale and delivery to the defendant. If there was such a distinct sale as the referee's finding seems to imply, the vendors' right to recover the price of the vendee does not depend upon their rights or liabilities under the contract of the 10th of March, however the ultimate recovery might be affected or reduced by any counter-claim of the defendant for damages in consequence of a breach of that agreement. If I could find in this case any unequivocal proof of the price or value of the property included in this separate sale, I should have no difficulty in sustaining a recovery against the defendant in this action to that extent. But the referee does not state this price or value, nor is there any evidence of it except in a bill produced at the trial, and stated to have been rendered to the defendant by the present plaintiff after the assignment to him.

The referee held that the plaintiff's recovery could not be mitigated or reduced by the loss or damage sustained by the defendant by the breach of the contract. Without discussing that question I will proceed to consider the case in a broader aspect, and to examine the main question, whether the plaintiff can recover for the price or value of the articles actually delivered by his assignor.

The referee decided that although there had been only a partial performance of the contract, yet the defendant was liable to pay for the articles delivered under it in such part performance, because they were accepted and used by him. He considered that the deliveries stipulated in the months of April, May, and June were to be treated as separate contracts. Even if this were so, the vendors did not perform their contract in respect to the deliveries for the month of April, and the case, after all, stands upon a partial performance only. In *Deming v. Kemp*,¹ which is cited by the referee, the original contract was void by the Statute of Frauds, and each separate delivery was, therefore, regarded as a separate sale made upon an independent contract. The same feature exists in the case of *Scymour v. Davis*, decided in the same court.²

In the present case there was a valid contract between D. O. Ketchum & Co. and the defendant, for the sale and delivery of bottles of specified sizes during three months. The defendant, no doubt, made this contract with a view to the requirements of his business, and for the purpose of being supplied with the articles from time to time as he required them. The vendors failed to perform their part of this agreement, and the court below held that the defendant was nevertheless bound to performance, that is, payment on his part, because he did not return the articles which had been delivered to him. So far as we have any evidence in the case, as to the time and mode of payment, it was not due until after all the deliveries had been made. The contract was entire, and called for an entire performance, and until such performance was made or tendered there was no liability on the part of the defendant. Even if each month's delivery is regarded as a separate contract, still the same principles apply and must control the rights of these parties. Even in that aspect of the case, as I have already said, there has been a breach of the contract by the vendor, and his claim for compensation rests upon mere partial performance. I am unable to see any distinction between such a case and that of *Champlin v. Rowley*, in the Court of Errors.³ The idea of an equitable right of recovery in such cases, which was discountenanced by the chancellor in his opinion there, has found no more favor in the courts of this State subsequently. In *Smith v. Brady*,⁴ the principles which control all this class of cases were elaborately considered in this court, and it would be a distinct departure from the doctrine of that case to sustain a recovery for the price of the articles delivered under this contract upon the facts before us in this case. The defendant was not bound to retain the articles delivered to him under the contract in the course of the month of April, or of any other month included within its limits, without using or disposing of them until the contract, or even the month, had expired, to ascertain whether the vendors would perform their agreement. He made his contract to obtain the

¹ 4 Sand. S. C. R. 147.

² 2 Sand. S. C. R. 239.

³ 18 Wend. 258.

⁴ 17 N. Y. 173.

articles which he was to buy for immediate and constant use, and no one could have demanded or expected that he would not use them as they were required in his business. But if he did not waive the performance of the contract he had a right to insist upon its performance as an entirety, and when the vendors, without cause or excuse, refused to perform it, he was not bound to return what he had received, nor could he be compelled to pay for a part performance. Such certainly is now the settled doctrine of the courts of this State.

The case of *Shields v. Pettee*,¹ which was cited by the referee in his opinion and on the argument, has no application to the present case. That was a sale of a certain amount of iron as an entirety, all deliverable at once. After the delivery had commenced the vendees found the article not to be such as they had agreed to buy, and they refused to receive any more. They did not, however, return what they had already received, but claimed to retain this, while they refused the residue and still claimed damages for the inferiority in quality of what they retained. The court held that the vendees must either affirm or rescind *in toto*, and that they could not retain a part of the iron sold them and at the same time refuse the residue, and claim damages for its non-delivery. The difference is as plain between this case and that, as it is between such a case and one where a vendee accepts an article with his eyes open and thus elects to consider it a performance of the contract, although it is different from what the vendor agreed to make it. If, in the case of the sale of the iron, the vendors, after delivering a part, had unjustifiably refused to deliver the residue, and yet claimed to recover for what they had delivered, or if in the latter case supposed, the vendor had tendered an article which was not according to his contract, and sought to recover its price although the vendee refused to receive it, the cases would be more analogous to the present.

As I see no way of retaining the judgment for the articles sold and delivered independently of the contract, it must be reversed and a new trial ordered in the court below.

Judgment reversed, and new trial ordered.

JONAH ATKINS v. COUNTY OF BARNSTABLE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1867.

[*Reported in 97 Massachusetts Reports, 428.*]

CONTRACT for building a section of a public highway in Truro. The declaration contained two counts, the first on a written contract, in which it was provided that the work should be done "to the acceptance of the

¹ 2 Sand. S. C. 262.

county commissioners," and the price of six hundred and thirty dollars should be paid therefor; the second, the common count for work and labor done for the defendants. Answer, denial that the work was done "to the acceptance of the county commissioners," and averment of payment to the plaintiff of the full value of his work and labor.

At the trial in the Superior Court, before ROCKWELL, J., it was agreed that the defendants had advanced to the plaintiff five hundred dollars, "with the understanding that such payment should not affect his claim, and on their statement that they did not accept the work;" and there was evidence of the manner in which the work was performed.

The plaintiff requested the judge to rule that if he executed his part of the contract according to its provisions, the defendants were bound to accept his work and pay him the price stipulated therein, and cannot defeat this action on the ground of their non-acceptance. But the judge declined so to rule, and instructed the jury as follows: "On the first count the plaintiff cannot recover unless he shows a substantial acceptance of the work by the county commissioners; but on the second count he may recover if he has satisfied the jury that in good faith he has exactly performed the contract, and made the section of the road according to the stipulations in every particular except that the commissioners did not accept it, he showing that it was entitled to the said acceptance, by the manner in which he had performed the work; and he may recover for the value of the labor and services what they were reasonably worth, not exceeding however the contract price. This action may be maintained, although the contract has not been performed according to its terms, provided the plaintiff has in good faith done what he believed to be a compliance with the terms of the contract, and has rendered a benefit to the defendants; and he may recover such sum as the labor and services were worth, not exceeding the contract price. Under the agreement of the parties concerning the payment of five hundred dollars made to the plaintiff, the recovery, if any, upon the principles above stated, will be for such sum as the jury may find he reasonably deserves to have, over and above five hundred dollars, but if they find that he does not reasonably deserve to have more than five hundred dollars, the verdict may be for the defendants. If the jury are satisfied that the plaintiff did not intend to perform the stipulations of the contract substantially, and did not so perform them, he cannot recover upon either count."

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

J. M. Day for the plaintiff.

H. A. Scudder for the defendants.

BIGELOW, C. J. The instructions were in conformity to the decided cases and in all respects sufficiently favorable to the plaintiff. As to his right to recover on the first count, the agreement was express that the work should

be done to the satisfaction of the county commissioners. The plaintiff was bound to show such acceptance in order to maintain an action on the written contract to recover the agreed price. *McCarren v. McNulty*.¹ As to a recovery on the second count, the elements necessary to establish a claim against the defendants and the measure by which the damages were to be assessed were correctly stated by the court. *Hayward v. Leonard*;² *Smith v. Lowell*;³ *Snow v. Ware*.⁴

Exceptions overruled.

JOAB HAPGOOD v. FRANK SHAW AND ANOTHER. FRANK SHAW
AND ANOTHER v. JOAB HAPGOOD.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1870.

[*Reported in 105 Massachusetts Reports, 276.*]

Two actions of contract. The first by Hapgood against Frank Shaw and George Warren, to recover back \$100 paid for guns which never were delivered; the second by Shaw and Warren against Hapgood, to recover for his refusal to accept and pay for the guns. The actions were tried together in the Superior Court before DEVENS, J.

It appeared at the trial that Hapgood, who was a dealer in guns in Boston, ordered guns from Joseph Child, a manufacturer in England, through Shaw and Warren, who were shipping merchants doing business in Boston and Liverpool under the name of Warren & Company; that Child sent the guns ordered, and also others not ordered, to Warren & Company, who paid for them and shipped them to America without authority; that Warren & Company signed and delivered to Hapgood, on the day of its date, the following agreement: "Boston, March 30, 1864. Received of Joab Hapgood \$100 on account of guns shipped by us per invoice about £90 sterling from Joseph Child, and now in bonded warehouse in New York, which guns we promise to deliver to said Hapgood on the first day of June next, or at such time as he shall order previous to that date, upon payment of balance of invoice, with freight, charges, and interest to date of remittance due in England;" that the guns mentioned in this agreement were the guns above mentioned as shipped by Warren & Company; that Hapgood, at the time of the execution of this agreement, paid the \$100, and agreed orally to receive the guns on or before June 1, 1864; that the guns were shipped and placed in the warehouse in the name of Warren & Company; "that from the date of the agreement until June 6, 1864, Warren & Company never delivered or offered to deliver the guns to Hapgood, or made to him any statement or demand of the amount of the sums to be

¹ 7 Gray, 139.

² 7 Pick. 181.

³ 8 Pick. 181.

⁴ 13 Met. 42.

by him paid for them ; that Hapgood never requested any such statement, or paid or offered to pay the said amount ; that on June 6, 1864, Warren & Company requested Hapgood to take and pay for the guns, which he refused to do ; and that the guns remained in the bonded warehouse in New York from October, 1863, when they arrived from Liverpool, until July, 1864, when they were sent back to Liverpool and sold by Warren & Company."

Shaw testified "that the items of charges upon the guns could not be ascertained until the goods were removed from the bonded warehouse ; that if Hapgood had received the guns in the fall of 1863, after they were placed in the warehouse, he would have paid to Warren & Company the freight and invoice, and received an order authorizing the guns to be taken from the bonded warehouse, and would have sent there for them and then paid the warehouse charges."

By consent of the parties the judge withdrew the cases from the jury and reported them for the determination of this court ; the parties agreeing "that if the court should be of opinion that the first case could be maintained on the foregoing evidence, so far as competent, judgment should be entered for the amount claimed in the declaration, with interest from the date of the writ, otherwise for the defendant ; if the court should be of opinion that the second case could be maintained for substantial damages, the case should be sent to an assessor to determine the amount of damages, otherwise judgment be entered for the plaintiff for nominal damages, or for the defendant, if the action cannot be maintained at all."

G. F. Hoar and T. L. Nelson for Hapgood.

F. P. Goulding and H. B. Staples for Shaw and Warren.

WELLS, J. Whether the contract between the parties was a sale and purchase of the guns, or an agreement to adopt the acts of Warren & Company, and adjust their advances and expenses in the execution of an agency assumed by them without authority, is immaterial to the decision of these cases. The rights and liabilities of the respective parties here must be determined by the provisions of their mutual agreement. Both actions are founded on that agreement. Warren & Company sue for the balance due under it ; Hapgood for a return of his money, on the ground of a default by Warren & Company in not delivering the guns.

It is also unnecessary to determine whether, under this agreement and the circumstances affecting it, the guns were to be transported and delivered specifically at Boston by Warren & Company, or whether a delivery by an order upon the warehouse in New York, subject to the payment of the charges there, would be a sufficient delivery to meet the requirements of the written agreement. Warren & Company have not made nor offered to make a delivery in either form, until after the time fixed by the terms of their agreement for such delivery.

If this had been an absolute, independent agreement on the part of

Warren & Company, they would have been in default upon the facts here shown. But the case finds a mutual agreement. Hapgood, at the time of executing the written contract by Warren & Company, orally agreed "to receive the goods on or before June 1;" and this, with the acceptance of the writing, implied a promise to pay the balance as stipulated therein. The written contract, by its express terms, engages for the delivery, only "upon payment of balance of invoice, with freight, charges, and interest." These are mutually dependent stipulations. The acts of performance by each party are to be concurrent. There is nothing to be done by either, which by the terms of the agreement, or from the necessity of the case, must precede any action by the other.

It is urged in behalf of Hapgood that he could not pay until furnished with a statement of charges. But we do not see that Warren & Company were under any obligation to furnish such a statement except upon request and offer of payment, or notice of readiness to pay.

No place is specifically agreed on for the performance; so that neither party is in default for not being in readiness at such place.

The report states that from the date of the agreement until June 6 Warren & Company never delivered or offered to deliver the guns to Hapgood, or made to him any statement or demand of the amount of the sums to be by him paid for them; that Hapgood never requested any such statement, or paid or offered to pay the said amount."

Upon that statement, neither party is in default; neither can hold the other for a breach of the agreement. Hapgood was bound to pay only upon delivery of the guns, and Warren & Company were bound to deliver the guns only upon payment. Upon such an agreement, if both parties remain inactive there is no breach by either. If either would charge the other upon it, he must put him in default. He must show a refusal by the other party to perform, or some act or neglect on his part which may be regarded as equivalent to a refusal. Unless excused from performance on his own part by the refusal of the other party to perform, or some conduct equivalent to a refusal, he must show that he has offered to perform his part of the agreements; or at least that he gave notice of his readiness to perform, or being thus ready, requested performance by the other party. Failing to do that, he cannot charge the mere neglect of the other party to make any action as a refusal to perform, or as a breach of the agreement. *Gardiner v. Corson*; ¹ *Dana v. King*; ² *Hunt v. Livermore*; ³ *Kane v. Hood*; ⁴ *Tinney v. Ashley*; ⁵ *Cook v. Doggett*; ⁶ *Smith v. Boston & Maine Railroad*; ⁷ *Cobb v. Hall*; ⁸ *Howard v. Miner*; ⁹ *Green v. Reynolds*; ¹⁰ *Parker v. Parmele*; ¹¹ *Callonel v. Briggs*; ¹² *Collins v. Gibbs*; ¹³ *Jones v.*

¹ 15 Mass. 500.² 2 Pick. 155.³ 5 Pick. 395.⁴ 13 Pick. 281.⁵ 15 Pick. 546.⁶ 2 Allen, 439.⁷ 6 Allen, 262.⁸ 33 Vt. 233.⁹ 20 Me. 325.¹⁰ 2 Johns. 207.¹¹ 20 Johns. 130.¹² 1 Salk. 112.¹³ 2 Burr. 899.

Barkley.¹ It follows that in these suits neither party can recover on the ground of a breach of contract by the other. Nor can Hapgood maintain his action for a return of the money paid by him on account of the agreement. His only remedy is upon the contract itself, unless he can treat that as rescinded. *Thompson v. Gould*; ² *Hudson v. Swift*; ³ *Congdon v. Perry*.

The contract was binding upon both, and could be rescinded only by the concurrence of both. The act of Warren & Company in sending the guns back to England and selling them there, did not entitle Hapgood to treat the contract as rescinded; because they had, before doing so, "requested Hapgood to take and pay for the guns, which he refused to do." After that refusal he could not require them to hold the guns longer for his benefit, nor to account to him for the money advanced towards their cost. *Ross v. Tremain*.⁵ There having been no previous breach of the agreement on the part of Warren & Company, Hapgood's refusal to carry it into effect upon their offer to do so deprived him of the right afterwards to treat it as rescinded.⁶

According to the terms of the reservation, the entry must be in each case

Judgment for the defendant.

It is well as find him to be a party to the suit and to not be a party
(b.) *Performance Impossible.*

LUKE *et al.* v. LYDE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1759.

[*Reported in 2 Burrow, 882.*]

A SPECIAL case from the last Devonshire assizes; reserved by Lord MANSFIELD, who went that circuit last summer.

The defendant Lyde shipped a cargo of 1501 quintals of fish, at the port of St. John in Newfoundland, on board the ship "Sarah," belonging to the plaintiffs, to be carried to Lisbon. The plaintiffs were to be paid freight, at the rate of two shillings per quintal. The original price of the said cargo was, at Newfoundland, ten shillings and sixpence sterling per quintal.

The plaintiffs had also on board the said "Sarah," a cargo of 945 quintals of fish, which was their own property.

The ship sailed from the port of St. John on 27th November, 1756, and had proceeded seventeen days on her voyage, and was taken on the 14th of December following, within four days' sail of Lisbon, by a French ship. And the captain, the other officers, and all the crew (except one man and

¹ 2 Dougl. 684.

² 20 Pick. 134.

³ 20 Johns. 24.

⁴ 13 Gray, 3.

⁵ 2 Met. 495.

⁶ Chit. Con. (8th Am. ed.) 636.

boy) were taken out of the "Sarah" and put on board the French ship. The ship "Sarah" was retaken on the 17th of the same December, 1756, by an English privateer; and on the 29th of December, 1756, brought into the port of Biddeford in Devonshire.

The plaintiffs, having insured the ship and their part of the cargo, abandoned the same to the insurers. But the freight, which the owners were entitled to, was not insured.

The defendant had his goods of the recaptors, and paid them 5s. per quintal salvage, at the rate of 10s. per quintal value.

The fish could not be sold at all at Biddeford, nor at any other port in England, for more than 10s. per quintal, clear of all charges and expenses in bringing them to such port. And the most beneficial market (in the apprehension of every person) for disposing of the said cargo of fish, was at Bilboa in Spain, to which place the defendant sent it in the March following; and there was no delay in the defendant in sending the said cargo thither. And it was sold there for 5s. 6d. per quintal, clear of the freight thither, and of all expenses attending the sale there.

The freight from Biddeford to Lisbon is higher than from Newfoundland to Lisbon.

From the time of the capture, the whole way that the ship was afterwards carried was out of the course of her voyage to Lisbon.

The question was, "Whether the plaintiffs are entitled to any, and what freight, and at what rate, and subject to what deduction?"

Mr. *Hussey* for the plaintiffs.

Mr. *Gould* for the defendant.

LORD MANSFIELD said, That though he was of the same opinion at the assizes as he was now, yet he was desirous to have a case made of it, in order to settle the point more deliberately, solemnly, and notoriously, as the case was of so extensive a nature; and especially, as the maritime law is not the law of a particular country, but the general law of nations: "*non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.*"

He said, he always leaned (even where he had himself no doubt) to make cases for the opinion of the court; not only for the greater satisfaction of the parties in the particular cause, but to prevent other disputes, by making the rules of law and the ground upon which they are established certain and notorious; but he took particular care that this should not create delay or expense to the parties, and therefore he always dictated the case in court and saw it signed by counsel, before another cause was called; and always made it a condition in the rule, "that it should be set down to be argued within the first four days of the term." Upon the same principle, the motion "to put off the argument of this case to the next term," was refused; and the plaintiff will now have his judgment within a few days, as soon as he could have entered it up if no case had been reserved,

at the expense of a single argument only : and some rules of the maritime law, applicable to a variety of cases, will be better known. He said, before he entered into it particularly, he would lay down a few principles, viz. :—

If a freighted ship becomes accidentally disabled on its voyage (without the fault of the master), the master has his option of two things ; either to refit it (if that can be done with convenient time), or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage. And so it was determined in the House of Lords, in that case of *Lutwidge & How v. Grey et al.*

As to the value of the goods, it is nothing to the master of the ship “whether the goods are spoiled or not.” Provided the freighter takes them, it is enough if the master has carried them ; for by doing so he has earned his freight. And the merchant shall be obliged to take all that are saved, or none ; he shall not take some, and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons all, he is excused freight ; and he may abandon all, though they are not all lost. (I call the freighter the merchant, and the other the master, for the clearer distinction.)

Now here is a capture without any fault of the master, and then a recapture. The merchant does not abandon, but takes the goods, and does not require the master to carry them to Lisbon, the port of delivery. Indeed, the master could not carry them in the same ship, for it was disabled, and was itself abandoned to the insurers of it ; and he would not desire to find another, because the freight was higher from Biddeford to Lisbon, than from Newfoundland to Lisbon.

There can be no doubt but that some freight is due, for the goods were not abandoned by the freighter, but received by him of the recaptor.

The question will be “what freight ?”

The answer is “a ratable freight,” i. e., *pro rata itineris*.

If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion, *pro rata*, of the former part of the voyage.

I take the proportion of the salvage here to be half of the whole cargo, upon the state of the case as here agreed upon. And it is reasonable that the half here paid to the recaptor should be considered as lost. For the recaptor was not obliged to agree to a valuation, but he might have had the goods actually sold, if he had so pleased, and taken half the produce ; and therefore the half of them are as much lost as if they remained in the enemy's hands. So that half the goods must be considered as lost, and half as saved.

Here the master had come seventeen days of his voyage, and was within four days of the destined port when the accident happened. Therefore he

ought to be paid his freight for $\frac{1}{2}$ parts of the full voyage, for that half of the cargo which was saved.

I find by the ancientest laws in the world (the Rhodian laws), that the master shall have a ratable proportion, where he is in no fault. And *Consolato del Mere*, a Spanish book, is also agreeable thereto. Ever since the laws of Oleron, it has been settled thus. In the Usages and Customs of the Sea (a French book), with observations thereon, the fourth article of the Laws of Oleron is, "That if a vessel be rendered unfit to proceed in her voyage, and the mariners save as much of the lading as possibly they can; if the merchants require their goods of the master, he may deliver them, if he pleases, they paying the freight in proportion to the part of the voyage that is performed, and the costs of the salvage; but if the master can readily repair his ship, he may do it, or if he pleases, he may freight another ship to perform his voyage." Amongst the observations thereon, the first is, "that this law does not relate to a total and entire loss, but only to salvage; or rather, not to the shipwreck, but to the disabling of a ship, so that she cannot proceed in her voyage without refitting; in which case the merchants may have their goods again, paying the freight in proportion to the way the ship made."

The observation adds further, "That if the master can, in a little time, refit his vessel and render her fit to continue her voyage (that is, if he can do it in three days' time at the most, according to the *Hanse-Town laws*), or if he will himself take freight for the merchandise aboard another ship, bound for the same port to which he was bound, he may do it; and if the accident did not happen him by any fault of his, then the freight shall be paid him." The thirty-seventh article of the *Laws of Wisbury* is to the very same purport.

Roccus de Navibus et Naulo, in note eighty-first, says: "*Declara hoc dictum. Ubi nauta munere vehendi in parte sit functus, quia tunc pro parte itineris quo merces inventæ sint, vecturam deberi æquitas suadet; et pro ea rata mercedis solutio fieri debet. Ita Paul de Castro, etc.*" (Then a string of authorities follows.) "*Et probat Joannes de Evia, etc.; qui hoc extendit in casu quo merces fuerint deperditæ (totally lost) una cum navi, et certa pars ipsarum mercium postea fuerit salvata et recuperata; tunc naulum deberi pro rata mercium recuperatarum, et pro rata itineris usque ad locum in quo casus adversus acciderat, fundat, etc.*" (And then he goes on with authorities.) "*Item declara, quod si dominus seu magister navis solverit mercatori pretium mercium deperditarum, tunc tenetur mercator ad solutionem nanli; quia merces habentur ac si salvatæ fuissent.*"

In another book entitled *The Ordinance of Lewis the XIV.*, established in 1681 (collected and compiled under the authority of M. Colbert), the same rules are laid down, particularly in the eighteenth, nineteenth, twenty-first, and twenty-second articles. Article eighteenth directs, That no freight shall be due for goods lost by shipwreck, or taken by pirates or enemies.

Article nineteenth is, That if the ship and goods be ransomed, the master shall be paid his freight to the place where they were taken; and he shall be paid his whole freight, if he conduct them to the place agreed on, he contributing towards the ransom. (Article twentieth settles the rate of contribution.) Article twenty-first, The master shall likewise be paid the freight of goods saved from shipwreck, he conducting them to the place appointed. Article twenty-second, If he cannot find a ship to carry thither the goods preserved, he shall only be paid his freight in proportion to what he has performed of the voyage.

And the case in the House of Lords between Lutwidge & How v. Gray *et al.* is also in point, and was well considered there. And Lord TALBOT gave the reasons of the judgment of the House, at length.

Therefore in the present case, a ratable proportion of freight ought to be paid for half the goods.

It is quite immaterial what the merchant made of the goods afterward, for the master hath nothing at all to do with the goodness or badness of the market; nor indeed can that be properly known till after the freight is paid, for the master is not bound to deliver the goods till after he is paid his freight. No sort of notice was taken of that matter in the case of Lutwidge & How v. Gray, in the House of Lords; and yet there the tobacco was damaged very greatly, even so much that a great part of it was burnt at the scales at Glasgow.

Therefore the verdict must be for 60*l.* 14*s.*, which, upon computation, amounts to the ratable proportion of the freight, being $\frac{1}{2}\frac{1}{4}$ of 75*l.*, the half of 150*l.*

Consequently, the verdict which was for 70*l.* must be set right, and made 60*l.* 14*s.*

Let the postea be delivered to the plaintiff.

MENETONE v. ATHAWES.

IN THE KING'S BENCH, NOVEMBER 22, 1764.

[Reported in 3 Burrow, 1592.]

THIS was an action by a shipwright for work and labor done and materials provided, in repairing the defendant's ship. And the question was, "Whether the plaintiff was entitled to recover, under the following circumstances."

The ship, being damaged, was obliged to put back, in order to be repaired in dock; and was to have gone out of the dock on a Sunday; in the interim, viz. on the day before, and when only three hours' work was wanting to complete the repair, a fire happened at an adjacent brew-house, and was communicated to the dock; and the ship was burnt.

N. B. It was the shipwright's own dock? and the owner of the ship had agreed to pay him 5*l.* for the use of it.

This case was argued on Tuesday, the 13th of this month, by Mr. *Murphy*, for the plaintiff; and Mr. *Dunning*, for the defendant.

For the plaintiff, it was insisted that he was not answerable for this event, which happened without his neglect or default; unless there had been some special undertaking.

Indeed, a tenant is bound to provide the landlord as good a house, in case of its being burnt, if he covenants to deliver up the house to him again, in as good repair as it was then: upon such a special undertaking an action would lie, but not otherwise. Doctor and Student, dialogue 2, chap. 4.

In the case of wagoners and common carriers, they are bound to answer for the goods against all events but acts of God and of the enemies of the king. *Coggs v. Bernard*¹; *Amies v. Stephens*.² And a gaoler is excusable from escapes in those cases.³ And in like manner, where it is the act of God, the person who has the custody of another man's property is excused.

The plaintiff here was a general bailee only, therefore not chargeable.⁴ He was only obliged to keep it as he would keep his own.

The case of *Coggs v. Bernard* in 2 Ld. Raym. 909, overrules *Southcote's* case in 4 Co. 84.

Even a pawn remains the property of the original owner. Sir John Hartopp *v. Hoare*.⁵ The plaintiff was considered as a mere bailee, for safe custody only.

In insurances made by merchants, it is usual to insert docks. The men were on board of this ship (though that makes no difference).

The plaintiff therefore was not answerable for this loss of the ship. And if the plaintiff be not liable for the loss of the ship, he is entitled to be paid for his work and materials. The materials must be considered as having been delivered. The merchant always pays 5*l.* for the hire of a dock, and so he agreed to do in this case. And these materials were delivered on board his ship in this dock.

When tithes are set out, they are thereby vested in the parson, and he may maintain trespass for any injury done to them.

The defendant might have sold this ship while it was in the dock, and these materials would have been part of it. The fixing them to the ship was a delivery of them. The adjunct must go with the subject. Dr. Cowell in treating of the various modes of acquiring property, is of this opinion.

Mr. *Dunning*, *contra*, for the defendant.

The question is, "Whether the plaintiff is entitled to be paid by the defendant for that work and labor from which the defendant neither did nor could reap any advantage."

¹ 2 Ld. Raym. 909.

² 1 Str., 128.

³ 1 Ro. Abr. 808, pl. 5, 6.

⁴ 1 Inst. 89.

⁵ 2 Str. 1187.

The plaintiff was obliged to redeliver the ship safe, having undertaken to repair it.

The defendant has had no benefit from the plaintiff's labor or materials; neither was the plaintiff's undertaking completely performed.

Carriers and hoy-men cannot be entitled to be paid for carrying things that perish before they are delivered; nor jewellers, for setting a jewel that is destroyed before it is set. So a tailor, where the cloth is destroyed before the suit is finished. So of any unfinished, incomplete undertaking.

As there is no express agreement to support this action, the court will not imply any.

Mr. *Murphy* in reply. As to the defendant's not having had the benefit of the repair. There is no reason why the shipwright should not be paid for his work and labor and materials. "Digest," title *de negotiis gestis*. The defendant might have insured his ship.

Nothing can be due to a carrier or hoy-man till the delivery of the goods at the destined place. But these materials were delivered, and the work and labor actually done.

Suppose a horse, sent to a farrier's to be cured, is burnt in the stable before the cure is completely effected; shall not the farrier be paid for what he has already done?

A pawnbroker, if the pawn is destroyed by the act of God, shall recover the money lent.

Lord MANSFIELD. This is a desperate case for the defendant (though compassionate). I doubt it is very difficult for him to maintain his point. Besides it is stated, "That he paid 5*l.* for the use of the dock."

Mr. Justice WILMOT. So that it is like a horse that a farrier was curing being burnt in the owner's own stable.

Mr. *Attorney-General* being retained to argue it for the defendant,

The court offered to hear a second argument from him, if he thought he could maintain his case, but seemed to think it would be a very difficult matter to do it.

Mr. *Attorney-General* appeared to entertain very little hope of success: however, he desired a day or two to consider of it. But

Mr. *Recorder* now moving "That the *postea* might be delivered to the plaintiff," —

The *Attorney-General* did not oppose it.

And a Rule was made accordingly,

That the *postea* be delivered to the plaintiff.

CUTTER, ADMINISTRATRIX OF CUTTER, v. POWELL.

IN THE KING'S BENCH, JUNE 9, 1795.

[Reported in 6 Term Reports, 320.]

To assumpsit for work and labor done by the intestate, the defendant pleaded the general issue. And at the trial at Lancaster the jury found a verdict for the plaintiff for 31*l.* 10*s.*, subject to the opinion of this court on the following case.

The defendant being at Jamaica subscribed and delivered to T. Cutter the intestate a note, whereof the following is a copy ; "Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The ship Governor Parry sailed from Kingston on the 2d of August, 1793, and arrived in the port of Liverpool on the 9th of October following. T. Cutter went on board the ship on the 31st of July, 1793, and sailed in her on the 2d day of August, and proceeded, continued, and did his duty as second mate in her from Kingston until his death, which happened on the 20th of September following, and before the ship's arrival in the port of Liverpool. The usual wages of a second mate of a ship on such a voyage, when shipped by the month out and home, is four pounds per month : but when seamen are shipped by the run from Jamaica to England, a gross sum is usually given. The usual length of a voyage from Jamaica to Liverpool is about eight weeks.

This was argued last term by *J. Heywood* for the plaintiff : but the court desired the case to stand over, that inquiries might be made relative to the usage in the commercial world on these kinds of agreements. It now appeared that there was no fixed settled usage one way or the other ; but several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part. The case was now again argued by

Chambre for the plaintiff, and

Wood for the defendant.

Lord KENYON, C. J. I should be extremely sorry that in the decision of this case we should determine against what has been the received opinion in the mercantile world on contracts of this kind, because it is of great importance that the laws by which the contracts of so numerous and so useful a body of men as the sailors are supposed to be guided should not be overturned. Whether these kind of notes are much in use among the seamen, we are not sufficiently informed ; and the instances now stated to us

from Liverpool are too recent to form anything like usage. But it seems to me at present that the decision of this case may proceed on the particular words of this contract and the precise facts here stated, without touching marine contracts in general. That where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued, and did his duty as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are that the common rate of wages is four pounds per month, when the party is paid in proportion to the time he serves; and that this voyage is generally performed in two months. Therefore if there had been no contract between these parties, all that the intestate could have recovered on a *quantum meruit* for the voyage would have been eight pounds; whereas here the defendant contracted to pay thirty guineas provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance. On this particular contract my opinion is formed at present; at the same time I must say that if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my own opinion.

ASHHURST, J. We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore we have nothing to guide us but the terms of the contract itself. This is a written contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it. It has been argued, however, that the plaintiff may now recover on a *quantum meruit*; but she has no right to desert the agreement; for wherever there is an express contract, the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question; the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

GROSE, J. In this case the plaintiff must either recover on the particular stipulation between the parties, or on some general known rule of law, the latter of which has not been much relied upon. I have looked into the laws of Oleron, and I have seen a late case on this subject in the Court of

*Common Pleas, Chandler v. Greaves.*¹ I have also inquired into the practice of the merchants in the city, and have been informed that these contracts are not considered as divisible, and that the seaman must perform the voyage otherwise he is not entitled to his wages; though I must add that the result of my inquiries has not been perfectly satisfactory, and therefore I do not rely upon it. The laws of Oleron are extremely favorable to the seamen; so much so that if a sailor, who has agreed for a voyage, be taken ill and put on shore before the voyage is completed, he is nevertheless entitled to his whole wages after deducting what has been laid out for him. In the case of *Chandler v. Greaves*, where the jury gave a verdict for the whole wages to the plaintiff, who was put on shore on account of a broken leg, the court refused to grant a new trial, though I do not know the precise grounds on which the court proceeded. However in this case the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage; and the latter was to be entitled either to thirty guineas or to nothing, for such was the contract between the parties. And when we recollect how large a price was to be given in the event of the mate continuing on board during the whole voyage, instead of the small sum which is usually given per month, it may fairly be considered that the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage. That seems to me to be the situation in which the mate chose to put himself; and as the condition was not complied with, his representative cannot now recover anything. I believe, however, that in point of fact, these notes are in common use, and perhaps it may be prudent not to determine this case until we have inquired whether or not there has been any decision upon them.

LAWRENCE, J. If we are to determine this case according to the terms of the instrument alone, the plaintiff is not entitled to recover, because it is an entire contract. In *Salk. 65*, there is a strong case to that effect; there debt was brought upon a writing, by which the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him 100*l.* per annum for his service; the plaintiff showed that the defendant's testator died three quarters of a year after, during which time he served him, and he demanded 75*l.* for three quarters; after judgment for the plaintiff in the Common Pleas, the defendant brought a writ of error, and it was argued that without a full year's service nothing could be due, for that it was in nature of a condition precedent; that it being one consideration and one debt it could not be divided; and this court were of that opinion, and reversed the judgment. With regard to the common case of an hired servant, to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the gen-

¹ Hil. 32 Geo. 3 C. B.

eral understanding upon the subject, that the servant shall be entitled to his wages for the time he serves though he do not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. But if this is to depend altogether on the terms of the contract itself, she cannot recover anything. As to the case of the impressed man, perhaps it is an excepted case; and I believe that in such cases the king's officers usually put another person on board to supply the place of the impressed man during the voyage, so that the service is still performed for the benefit of the owners of the ship.

Postea to the defendant,

unless some other information relative to the usage in cases of this kind should be laid before the court before the end of this term; but the case was not mentioned again.

APPLEBY v. DODS.

IN THE KING'S BENCH, APRIL 18, 1807.

[*Reported in 8 East, 300.*]

IN ASSUMPSIT for a seaman's wages, it appeared at the trial at the last sittings at Guildhall, that the plaintiff served as a mariner on board a West India ship belonging to the defendant, under the usual articles, which stated the ship to be "bound for the ports of Madeira, any of the West India Islands, and Jamaica, and to return to London;" and in consideration of "the monthly or other wages there mentioned," the seamen severally undertook to "perform the above-mentioned voyage:" and the master agreed with and hired them "for the said voyage at such monthly wages, to be paid pursuant to the laws of Great Britain;" and the seamen bound themselves to do their duty, etc., as seamen "at all places where the ship should put in or anchor during the said ship's voyage; and not to go out of the same on board any other vessel, or be on shore on any pretence whatsoever, till the voyage was ended, and the ship discharged of her cargo, without leave," etc., and in default thereof to be liable to the penalties mentioned in the statutes 2 G. 2, c. 36 and 37 G. 3, c. 73. "And it was further agreed that no seaman, etc., shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge, and her cargo delivered," etc. It was proved that the ship sailed from Gravesend on the 11th of February, 1806, with a full cargo of goods for Madeira, which she delivered there in April, and there took in a full cargo of wine, part of which she afterwards delivered at Dominica; and from thence proceeded to Kingston in Jamaica, where she

delivered other part of the wine, and took in Government stores for Port Antonio, another port of Jamaica, which were there delivered; and then proceeded to Martha Bray in the same island, where she arrived on the 28th of June, and delivered the remainder of the wine shipped at Madeira; and then loaded with sugars, etc. for London, and sailed on the 27th of July, and was afterwards lost at sea on the 28th of August, in the course of her passage home. And thereupon it was contended on the part of the plaintiff, that the voyage being by the terms of it divided into three parts, first to Madeira, next to the West Indies, and then home; and freight, which is called the Mother of Wages, having been earned in the two first stages of the voyage; he was entitled to recover his wages *pro rata* for so many entire months (the reservation being monthly) as had elapsed between the original inception of the contract and the 27th of July, when the ship sailed from Martha Bray, her last port of delivery in Jamaica. And in aid of this construction it was remarked, that though in the clause restricting the demand for wages "until the arrival of the ship at the above-mentioned port of discharge," the word *port* is there used in the singular number; yet that considering the whole tenor of the agreement, and that in the previous part of it the ship is described to be "bound for the ports of Madeira," etc. (in the plural), and that the voyage was divisible into three distinct parts, so as for the ship to have earned freight on the two first parts, though she were lost on her return home; the word *port*, in the latter part, must be construed *reddendo singula singulis*, as applicable to each port of discharge in the course of the voyage. Lord ELLENBOROUGH, however, was of opinion that the true construction of the articles founded on the policy of the Act of the 37 Geo. 3, c. 73, excluded the plaintiff from recovering wages *pro rata*, inasmuch as the ship never arrived at her port of discharge, which he considered to be London; and thereupon nonsuited the plaintiff.

Wigley now moved to set aside the nonsuit.

Lord ELLENBOROUGH, C. J. The terms of the contract in question are quite clear and reasonable: they relate to a voyage out to Madeira and any of the West India Islands, and to return to London; and there is an express stipulation "that no seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the above-mentioned port of discharge," etc.; which must refer to London. And though the reason of this stipulation was, no doubt, to oblige the mariners to return home with the ship, and not to desert her in the West Indies, yet the terms of it are general, and include the present case: and we cannot say, against the express contract of the parties, that the seamen shall recover *pro rata*, although the ship never did reach her port of discharge named. The anxious policy of the legislature to enforce the return home of seamen in their ships from the West Indies, in addition to the forfeiture of wages, has also given penalties in case of disobedience to their personal obligations.

LAWRENCE, J. The case before Lord HOLT was rightly decided upon the general principles of law, arising on the contract, whatever counter remedy there might have been upon the bonds. And the Court of Chancery afterwards, in giving relief to the representatives of the captain, against whom the recovery was had at law, upon a bill filed against the ship-owners and the company, might have considered that there was something unreasonable in the bargain.

Per Curiam,

Rule refused.

LIDDARD v. LOPES AND ANOTHER.

IN THE KING'S BENCH, FEBRUARY 7, 1809.

[*Reported in 10 East, 526.*]

THE plaintiff brought *indebitatus assumpsit* for the freight of goods, and also for the use and hire of a ship used by the defendants with a cargo belonging to them; with counts also for demurrage, and for work and labor; and at the trial before Lord ELLENBOROUGH, C. J., in London, a verdict was taken for the plaintiff for 1000*l.*, subject, as to the amount, to the award of an arbitrator, if the court should be of opinion that the plaintiff was entitled to recover upon the following case.

The plaintiff was the owner of the ship *Mayflower*: the defendants were merchants in London: and on the 24th of August, 1807, an agreement in writing, in the nature of a charter-party, was entered into between them, whereby it was "mutually agreed between W. Liddard, owner of the ship the *Mayflower*, then lying at Hull, and Messrs. Lopes and Collins of London, merchants, that the said ship being tight, etc., should, with all convenient speed, proceed to Shields, and there load from the factors of the freighters a full and complete cargo of coals in bulk, and proceed therewith to Lisbon with the first convoy, and deliver the same on being paid freight, at the rate of 45*l.* per keel, together with 5*l.* per cent primage, in lieu of port charges and pilotage (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, during the said voyage, always excepted), the freight to be paid on right delivery of the cargo. Fifteen running days are to be allowed the said merchants (if the ship is not sooner dispatched) for unloading the ship at Lisbon, and the customary time to load at Shields; and ten days on demurrage over and above the said laying days at 5*l.* per day. Penalty for non-performance of this agreement, 500*l.*" Soon after this agreement was made the ship took in a cargo of ten keels of coals belonging to the defendants at Shields, and sailed thence on the 3d of September, 1807, and arrived at Portsmouth on the 15th in order to join convoy. On the 20th, the captain, having received sailing instructions,

sailed with the convoy from Portsmouth, and came to an anchor off Lymington, where the convoy was detained by contrary winds until the 15th of October; and on the 17th the sailing instructions were recalled, and the next day the ship returned to Spithead. The ports of Portugal were in the beginning of November shut against British ships by the Portuguese government, and continued shut until the French took possession of Portugal on the 30th of November; and from that time until and after the bringing of this action, Portugal has been occupied by the king's enemies, and the existing government of the country has been at war with Great Britain. On the 26th of December the plaintiff gave the following notice to the defendants: "I beg leave to confirm my notice to you of the 19th November; and I hereby give you further notice to get out the Mayflower's cargo of coals at Portsmouth; and unless necessary proceedings are taken to that effect on or before the 31st instant, I shall give orders to land and warehouse the same at your risk and expense. The average account shall be made out without further delay, and I shall wait on you for your proportion thereof. I also herewith inform you that I reserve to myself the right of proceeding against you at law for freight, demurrage," etc. On the 1st of January, 1808, the defendants sent the following answer to the plaintiff: "If you land the coals by the Mayflower you will take the consequences. We do not consent, if we are to be called upon for freight and expenses." The cargo remained on board the vessel at Portsmouth until the 12th of February, 1808, when it was landed by order of the plaintiff, after a previous notice given to the defendants. In March last, by consent of both parties, but without prejudice on either side, the coals were sold, and produced, after deducting the invoice price and all expenses of unloading, landing, and warehousing, a neat profit of 166*l*. 18*s*. The question for the opinion of the court was, Whether the plaintiff were entitled to recover a compensation for the part of the voyage which he had performed, and for the detention of his ship at Portsmouth? If he were not entitled to recover for either of these demands, a verdict was to be entered for the defendants.

Taddy for the plaintiff.

Storks for the defendants.

Lord ELLENBOROUGH, C. J. That was upon the ground of there having been an acceptance of the cargo by the owner in the course of the voyage, which showed his election to receive his goods at that place, instead of having them sent on to the place of their original destination; but the acceptance of the goods was the very substance of the new implied contract in *Luke v. Lyde*.¹ But here there has been no agreement to accept the goods; but they were landed and sold without prejudice to either party. The case of *Luke v. Lyde* has been often pressed beyond its fair bearing; but the true sense of it has been explained by my brother LAWRENCE in

¹ 2 Burr. 882.

*The distinction bet this & Luke v Lyde is very poor.
I think Ellenborough was saturated with Luke v Lyde.
I think here Lyde should have been liable for freight*

Cook v. Jennings,¹ and my brother LE BLANC in Mulloy v. Backer.² Then what does this case amount to. The parties have entered into a special contract, by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract; and that event has not taken place; there has been no such delivery; and consequently the plaintiff is not entitled to recover: he should have provided in his contract for the emergency which has arisen.

Per Curiam,

Postea to the defendants.

APPLEBY v. MYERS.

IN THE EXCHEQUER CHAMBER, JUNE 21, 1867.

[*Reported in Law Reports, 2 Common Pleas, 651.*]

APPEAL from a judgment of the Court of Common Pleas, in favor of the plaintiffs upon a special case, the report of which will be found *ante*, Vol. I., p. 615.³

¹ 7 T. R. 381.

² 5 East, 316.

³ This was an action brought to recover 419*l.* for work done and materials provided by the plaintiffs, engineers, for the defendant, under the circumstances hereinafter mentioned. The following case was stated, by consent, without pleadings, for the opinion of the court:—

On the 30th of March, 1865, the plaintiffs entered into an agreement with the defendant, which was headed, "Specification and estimate of engine, boiler, lifts, etc., for B. Meyers, Esq., Southwark Street. Messrs. Tillott & Chamberlain, architects. 30th March, 1865." This contract contained ten distinct parts or divisions; namely, 1, boiler; 2, engine; 3, shafting; 4, lifts; 5, shafting; 6, drying-room; 7, copper pans; 8, tanks; 9, pump; 10, steam-boxes, — under each of which headings were particular descriptions of the work to be done in connection with each respectively, and the prices to be charged for the same; and the document concluded with these words:—

We offer to make and erect the whole of the machinery of the best materials and workmanship of their respective kinds, and to put it to work, for the sums above named respectively, and to keep the whole in order, under fair wear and tear, for two years from the date of completion. All brickwork, carpenters' and masons' work, and materials are to be provided for us; but the drawings and general instructions required for them to work to will be provided by us, subject to the architects' approval.

(Signed)

APPLEBY BROTHERS.

The total cost of the above works, if they had been completed under the contract, would have amounted to 459*l.*

On the 4th of July, 1865, a fire accidentally broke out on the premises of the defendant in Southwark Street, which entirely destroyed the said premises and the works which then had been erected thereon by the plaintiffs in part performance of the contract above set out.

At the time of the fire, the works contracted to be erected as aforesaid had not been completed.

The premises upon which the several works were to be erected were the property

Hannen, Lumley Smith with him, for the defendant.

Holl for the plaintiffs.

The judgment of the court (MARTIN, B., BLACKBURN, J., BRAMWELL, B., SHEE and LUSH, JJ.) was delivered by

BLACKBURN, J. This case was partly argued before us at the last sittings, and the argument was resumed and completed at the present sittings.

Having had the advantage of hearing the very able arguments of Mr. *Holl* and Mr. *Hannen*, and having during the interval had the opportunity of considering the judgment of the court below, there is no reason that we should further delay expressing the opinion at which we have all arrived; which is, that the judgment of the court below is wrong, and ought to be reversed.

The whole question depends upon the true construction of the contract between the parties. We agree with the court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that if by any default on the part of the defendant his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or to treat the contract as rescinded and sue on a *quantum meruit*. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, — excusing both from further performance of the contract, but giving a cause of action to neither.

Then it was argued before us that, inasmuch as this was a contract of that nature which would in pleading be described as a contract for work, labor, and materials, and not as one of bargain and sale, the labor and materials necessarily became the property of the defendant as soon as they of the defendant, in his occupation, and under his entire control. The plaintiffs had access thereto only for the purpose of performing their contract.

At the time of the fire, portions of the items Nos. 1 to 8 were erected and fixed, and some of the materials for the others were on the premises.

The defendant had not completed the carpenters' and masons' work to be prepared by him under the agreement.

The tank had been erected by the plaintiffs, and was used by the defendant by taking water therefrom for the purposes of his business; but the other apparatus connected with it, as specified in No. 8, was not completed. The plaintiffs' workmen were still engaged in continuing the erection and completion of the same at the time of the fire.

The question for the opinion of the court was, whether under the above circumstances the plaintiffs were entitled to recover the whole or any portion of the contract price. — *Appleby v. Myers*, L. R. 1 C. P. 615. — Ed.

were worked into his premises and became part of them, and therefore were at his risk. We think that, as to a great part at least of the work done in this case, the materials had not become the property of the defendant ; for we think that the plaintiffs, who were to complete the whole for a fixed sum, and keep it in repair for two years, would have had a perfect right, if they thought that a portion of the engine which they had put up was too slight, to change it and substitute another in their opinion better calculated to keep in good repair during the two years, and that without consulting or asking the leave of the defendant. But, even on the supposition that the materials had become unalterably fixed to the defendant's premises, we do not think that under such a contract as this the plaintiffs could recover anything unless the whole work was completed. It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house ; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or the ship ; and therefore, generally, and in the absence of something to show a contrary intention, the bricklayer or tailor or shipwright is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether, in such a case, the non-completion is because the shipwright did not choose to go on with the work, as was the case in *Roberts v. Havelock* ;¹ or because in consequence of a fire he could not go on with it, as in *Menetone v. Athawes*.² But, though this is the *prima facie* contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the whole is complete, and not till then ; and we think that the plaintiffs in the present case had entered into such a contract. Had the accidental fire left the defendant's premises untouched, and only injured a part of the work which the plaintiffs had already done, we apprehend that it is clear the plaintiffs under such a contract as the present must have done that part over again, in order to fulfil their contract to complete the whole and "put it to work for the sums above named respectively." As it is, they are, according to the principle laid down in *Taylor v. Caldwell*,³ excused from completing the work ; but they are not therefore entitled to any compensation for what they have done, but which has without any fault of the defendant perished. The case is in principle like that of a shipowner who has been excused from the performance of his contract to carry goods to their destination because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment, on account of the part-performance of the voyage, unless there is something to justify

¹ 3 B. & Ad. 404.

² 3 Burr. 1592.

³ 3 B. & S. 826 ; 32 L. J. Q. B. 164.

the conclusion that there has been a fresh contract to pay freight *pro rata*.

On the argument, much reference was made to the Civil Law. The opinions of the great lawyers collected in the Digest afford us very great assistance in tracing out any question of doubtful principle; but they do not bind us; and we think that on the principles of English law laid down in *Cutter v. Powell*,¹ *Jesse v. Roy*,² *Munroe v. Butt*,³ *Sinclair v. Bowles*,⁴ and other cases, the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

We think, therefore, as already said, that the judgment should be reversed.

Judgment reversed.

HOPPER v. BURNES.

IN THE COMMON PLEAS DIVISION, FEBRUARY 23, 1876.

[*Reported in Law Reports, 1 Common Pleas Division, 137.*]

DECLARATION for freight, and for money received for the plaintiff's use.

Plea (*inter alia*), never indebted.

Issue.

The facts, as proved at the trial before HUDDLESTON, B., at the last Liverpool summer assizes, were as follows:—

The plaintiff, a shipowner, had chartered a ship to the defendant to carry a cargo of coals from Cardiff to Point de Galle, at a freight of 21s. per ton on the quantity delivered at the latter place. The defendant duly shipped a cargo of 704 tons of coals. On her voyage the ship met with bad weather, and suffered sea damage, and it was necessary to repair her at the Cape of Good Hope. For this purpose the captain, not having any funds, and not being able to raise any on bottomry or otherwise on the owner's credit, sold a portion of the coals, amounting to 470 tons, to defray the expense of the repairs, and having completed the repairs, sailed to the port of destination with the remainder of the cargo, 42 tons having been jettisoned, and 470 tons sold as before mentioned. The price of coals being very high at the Cape of Good Hope, it turned out that the coals sold there fetched 3*l.* 3*s.* 6*d.* per ton, a much higher price than if they had gone on to Point de Galle. The coals cost originally 1*l.* per ton. There was a general average statement made up, and in accordance with that statement the defendant received from the plaintiff the net proceeds of the coals sold at the Cape of

¹ 6 T. R. 320; 2 Smith's L. C. 1.

² 1 C. M. & R. 316.

³ 8 El. & Bl. 738.

⁴ 9 B. & C. 92.

Good Hope, but the statement did not make any allowance in respect of freight on those coals to the plaintiff. The plaintiff contended that he was entitled to *pro rata* freight in respect thereof, and consequently sought to recover back the amount of such freight. On these facts the verdict was entered for the plaintiff for the freight claimed, with leave to the defendant to move to enter a nonsuit or a verdict, on the ground amongst others, that there was no liability on the part of the defendant to pay the freight claimed.

A rule *nisi* had been obtained accordingly.

Herschell, Q.C., and *Crompton* showed cause.

Benjamin, Q.C., and *Myburgh* supported the rule.

BRETT, J. In this case the plaintiff seeks to recover either in respect of freight or money received to his use. He cannot recover the sum of money which he claims as money had and received unless he is entitled to freight. And so the main question is whether he is entitled to the freight. It is to be taken that the circumstances were such that the captain by the general maritime law was justified in selling part of the charterer's cargo, and that such sale was not a wrongful act. Such a right arises, although it is the duty of the shipowner to repair the ship ultimately at his own expense.

The coals so sold fetched more at the Cape of Good Hope than they would have done at Point de Galle, and the suggestion is, that under these circumstances the plaintiff is entitled not only to freight on the cargo actually delivered at the port of destination, but also to freight in respect of the coals sold at the Cape of Good Hope. Now, it is obvious that the only freight expressed to be payable by the terms of the charter is a freight of 21s. per ton on cargo delivered at Point de Galle, so that this freight now claimed is not the charter freight. I know not how freight can become due under such a charter as this in respect of goods not carried to the port of destination otherwise than with reference to the doctrine of freight *pro rata*. What, then, is the principle governing the question whether such freight is payable? It is only payable when there is a mutual agreement between the charterer or shipper and the captain or shipowner, whereby the latter being able and willing to carry on the cargo to the port of destination, but the former desiring to have the goods delivered to him at some intermediate port, it is agreed that they shall be so delivered, and the law then implies a contract to pay freight *pro rata itineris*. Do the present circumstances come within that principle? The captain here is not able and willing to carry the coals on; he puts it out of his power to do so by the act of selling them. Again, the charterer has no option with regard to the sale at the intermediate port. The essential grounds of the inference which the law draws of an implied contract to pay freight *pro rata* do not exist. It is said by Mr. *Crompton* that the charterer has an option. I agree that he has, but I do not think any implication of a promise to pay freight *pro rata* can be drawn from it. He has, I think, an option to treat the pro-

ceeds of the sale as a loan, or he may say, "You have sold my goods against my will, and though by the maritime law that is not a wrongful sale, still I am entitled to and claim an indemnity against any loss occasioned by the sale." If he selects the former alternative, what is there to give rise to an implication that freight *pro rata* is payable? If he thinks that the goods have fetched more at the intermediate port than the remainder will do at the port of destination, why may he not treat the transaction as a loan at once and sue for the amount before the ship arrives at her destination? If the ship should be lost on her voyage between the intermediate port and the port of destination the charterer has no option; he cannot ask for an indemnity on the footing that the goods would have fetched more at the port of destination. The basis of the claim of indemnity in such a case is the supposition that the goods would fetch more at the port of destination than they did when sold. If the ship is lost the charterer or shipper never can claim an indemnity against the shipowner; the adventure is lost by perils of the sea. But I apprehend, though he could not claim an indemnity, he could treat the transaction as a forced loan, and claim the amount of the price for which the goods were sold. If the goods fetch more at the intermediate port, the owner of the cargo naturally would elect to treat the matter as a loan; but when he thinks it for his interest to insist and does insist on an indemnity on the footing that the value of the goods must be treated as if they were carried to their destination, then he must allow for the freight that would have been earned by carrying them there. Here the defendant had a right to treat the proceeds of the sale as a loan, and did so, and under those circumstances I see nothing to raise an implication of a liability to pay freight *pro rata*. This decision may seem hard, but the hardship, if any, arises from the form of the contract entered into. The loss to the shipowner is a loss by maritime perils, and the answer to any argument of hardship seems to me to be that this is a case in which the proper remedy is by insurance of freight.

ARCHIBALD, J. This question turns on whether or no the plaintiff is entitled to *pro rata* freight. I think that under the circumstances he is not. I take it that under a charter such as this there can be no right to freight unless the goods are delivered according to the charter, or a new contract is made between the parties, or facts exist from which such new contract may be inferred. Now can such a new contract be inferred here? The facts from which we are asked to infer one are that the goods have been sold justifiably in a case of necessity, and that the amount of the proceeds has been paid to the defendant. I do not think these facts alone are sufficient to raise the implication suggested. The proceeds might be received under such circumstances as to give rise to an implication of a contract to pay freight, but the mere receipt of the proceeds is not sufficient. *Baillie v. Mogdigliani*¹ has been referred to as establishing that the receipt

¹ 6 T. R. 421, n.

of the proceeds of a sale at an intermediate port is the same as that of the goods themselves; but the case of *Hunter v. Prinsep*¹ shows that the inference cannot be drawn in that absolute way. I agree that the case in which the implication can be drawn is when the captain is able to carry the goods on and the charterer chooses to have them delivered short of the port of destination. Here the charterer had no option. The sale though made justifiably, under circumstances of necessity, was a disposition of his property without his having any option in the matter. The true view seems to me to be that the transaction is in the nature of a forced loan, and consequently that the charterer is entitled to recover the amount of the proceeds of the sale as a loan.

The cases also establish that if the vessel reaches her destination the cargo owner may, instead of treating the transaction as a loan, claim compensation by way of indemnity. He would only do that if the goods realized less at the intermediate port than they would have done at the port of destination. It does not seem to me that the mere receipt of the amount of the proceeds is equivalent to a receipt of the goods at the intermediate port, or affords sufficient ground for an inference that the defendant agreed to pay freight *pro rata*.

LINDLEY, J. I am of the same opinion. The goods never were delivered at the port of destination, therefore the freight was not earned under the charter. The whole argument of the plaintiff, therefore, rests upon the fact that the defendant received the amount of the proceeds of the sale. If the transaction could be treated at the option of the defendant as a loan of money it is clear that the receipt by the defendant of the money was not equivalent to receipt of the goods at an intermediate port, and the argument wholly fails. The rule must be made absolute.

Rule absolute.

METCALFE v. THE BRITANNIA IRONWORKS COMPANY.

IN THE QUEEN'S BENCH DIVISION, JULY 11, 1876.

[*Reported in Law Reports, 1 Queen's Bench Division, 613.*]

Cohen, Q. C., *Beresford* with him, for the plaintiff.

W. Williams, Q. C., *Hollams* with him, for the defendants.

COCKBURN, C. J.² This is an action brought to recover a sum due for freight for the conveyance of a cargo of iron bars, shipped under two charter-parties on board the plaintiff's vessel, the *Meredith*, to be carried from Middlesborough-on-Tees to Taganrog on the sea of Azof, "or so

¹ 10 East, 378.

² The facts being sufficiently stated in the opinion of COCKBURN, C. J., the statement of facts has been omitted. — ED.

near thereto as the ship could safely get." The defendants were the charterers of the vessel. By the bills of lading, signed by the master, as well as by the charter-parties, the iron was to be delivered at the port of Taganrog. It was consigned to the Rostoff and Wladikowkese Railway Company, at the latter place.

The cargo having been taken on board, the ship started without delay on the voyage as agreed on; and arrived on the 17th of December at Kertch, a port distant from Taganrog about thirty miles. On arriving at Kertch, the master learned that the sea of Azof was blocked up with ice, and the navigation suspended, the effect of which was that the further conveyance of the cargo to its destination was rendered impracticable till the ensuing spring, the navigation being usually closed till the end of April. Relying on the terms of the charter-party, which, as has been stated, provided that the ship should proceed to Taganrog, "or so near thereto as she could safely get," the master, finding that he could get no nearer to Taganrog than Kertch, conceived that he was entitled to land the cargo at the latter place, and proceeded accordingly to discharge and land it. In so doing, he acted in direct defiance of the opposition of the agents of the charterers at Taganrog, to whom he had notified what he was about to do, and who, having thus become aware of it, gave him express notice not to land the cargo at Kertch, and that if he did so he would be held liable under the charter-party. There being no one to receive the cargo, the master placed it under the charge of the custom-house authorities. From the latter it was claimed by an agent of the Rostoff and Wladikowkese Railway Company, the consignees, and on the production of the charter-parties and bills of lading possession was delivered to their agent by the authorities, notwithstanding a claim by the master that it should be retained till his freight was paid. Upon taking possession, the agent of the consignees, who must be presumed to have had full authority for the purpose, delivered to the master, no doubt by the direction of the authorities, a receipt in these terms:—

"On the power of the charter-party and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the S.S. Meredith, composed of six thousand five hundred and seventy-eight (6578) bars of railway iron. This receipt to be the only one given, and all others to have no value.

"Kertch, 15/27 December, 1873."

Upon these facts I entirely concur in thinking that the plaintiff is not entitled to recover the full freight. The case of *Schilizzi v. Derry*¹ established that when a charter-party speaks of a vessel, bound to a particular port, discharging "as near as she can get" to such port, this must be taken to mean some place "within the ambit" of the port; and Kertch certainly cannot be said to be within the ambit of the port of Taganrog.

¹ 4 El. & Bl. 873; 24 L. J. Q. B. 193.

I also concur in thinking that the receipt given by the agent of the consignees does not amount to an admission of the "right delivery" of the cargo. It amounts to no more than an admission of the delivery of the cargo at Kertch, which is not a "right delivery" of it so as to entitle the owner to the full freight.

But it appears to me that the acceptance of the cargo by the consignees, and the receipt thus given by their authorized agent, are very material facts in determining the further question with which we have to deal, namely, whether the plaintiff, the shipowner, is here entitled to freight *pro rata itineris*.

I agree that according to the terms of an ordinary charter-party, or bill of lading, the whole voyage for which the freight is agreed to be paid must be accomplished before any freight becomes payable. And I agree that the master cannot, by wrongfully stopping short of the place of destination, compel the owner of the goods to take them, and pay the freight even for the part of the voyage performed, any more than the charterer, on the other hand, can insist on having the cargo delivered at an intermediate place, so as to deprive the shipowner of the opportunity of earning his full freight. If he desires to have his goods short of their original destination, unless some arrangement is come to between them, he must satisfy the shipowner for the entire freight as fixed by the charter-party.

But, it is obvious, that, while such is the absolute right of each of the parties to the charter, this right may be varied or waived; and that, while the shipowner may be willing to forego his right to earn the entire freight, on being paid a ratable part for so much of the voyage as has been performed, the goods-owner, on the other hand, may be willing to take the goods at an intermediate place, and to waive the conveyance of the goods to their original destination, paying a proportionate part only of the freight, all claim to the residue being abandoned. And such an arrangement, in substitution of the original contract, may not only be express, but may also be implied from the circumstances and the conduct of the parties; as was done in the case of *The Soblomsten*;¹ and ought to be so implied where justice and equity require it.

Where such an express arrangement has been come to, of course no difficulty exists. The case in which the question whether such an arrangement is to be implied usually arises, is where the ship becomes disabled by some *vis major*, and it becomes necessary to land the cargo at an intermediate port, where there are no means of sending it on, and it is there taken possession of by the owner, or sold by the master for the benefit of those concerned. Nothing could apparently be more unjust than that, having had the benefit of the conveyance of the cargo so far on its way, the owner, if he has derived benefit from its conveyance so far, should be released from the obligation of paying a proportionate part of the freight.

¹ L. R. 1 A. & E. 293.

No doubt, under such circumstances, it becomes necessary for the master, if he desires to earn the freight, either to repair his ship, or to procure another in which to send on the cargo. But it may be that the ship cannot be repaired, and that no other ship can be procured, or not without such a delay as would be fatal to the goods, or to the adventure. Under these circumstances the owner of the goods is not bound to take to them if unwilling to do so. If they are not worth paying the freight upon, he may refuse to accept them; but if he accept and dispose of them, ought we not to imply an undertaking on his part to pay for the conveyance of them so far as it has gone?

Such was the view taken by Lord MANSFIELD and the court of King's Bench, in conformity with the rule laid down by the old authorities on maritime commercial law, in the well-known case of *Luke v. Lyde*.¹ There a cargo of salt fish having been shipped on account of the defendant, a merchant in England, on board the plaintiffs' ship to be conveyed from Newfoundland to Lisbon, the ship, when within a few days' sail of Lisbon, had been taken by a French privateer, but had afterwards been recaptured and brought to England; whereupon the defendant claimed and obtained possession of the cargo. An action of *assumpsit* having been brought by the owners of the ship to recover freight *pro rata*, Lord MANSFIELD, in an elaborate judgment, after referring to the old authorities on maritime law, decided in favor of the plaintiffs, — not upon any fiction of a substituted contract, or of a dispensation of part of the voyage originally agreed on, but on the broad principle of maritime law, that, the voyage having been interrupted without any fault of the shipowner, the merchant, who has had the benefit of partial conveyance, if he takes the goods, must pay freight *pro rata*.

In so holding the Court of King's Bench appears to me, I must say, to have decided according to justice and good sense.

In the subsequent case of *Baillie v. Mogdigliani*² a ship bound from Nevis to Bristol had been taken by a French ship and condemned in a French prize court; but the sentence of condemnation was afterwards reversed, and restitution ordered. In the mean time, however, the ship and cargo had been sold. The merchants received the proceeds and paid freight to the master *pro rata itineris*; and the goods having been insured, they brought an action against the insurers to recover the amount of freight so paid. It was held that they could not recover; but Lord MANSFIELD said: "As between the owners of the ship and cargo, in case of a total loss, no freight is due; but as between them no loss is total where part of the property is saved, and the owner takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods; and, therefore, freight was certainly due *pro rata itineris*."

¹ 2 Barr. 882; 1 W. Bl. 190, s. c. *nom.* *Luke v. Lloyd*.

² Park on Insurance, ch. ii. 8th ed. p. 116.

The subsequent case of *Cook v. Jennings*¹ might at first sight appear to conflict with the foregoing authorities, inasmuch as, the ship having been wrecked on the voyage, but the goods having been saved, the merchant, who had taken possession of them, refused to pay freight, and the action having been brought to recover it *pro rata*, it was held that the action would not lie. But the decision turned on the form of action. The plaintiff, having sued on the charter-party, which was under seal, had declared in covenant; and as on reference to the charter-party it appeared that the freight was payable on the right delivery of the cargo at the port of destination, it was held that until this condition had been complied with no freight became payable under the charter; and that the contract being under seal, no implied assumpsit could be raised. LAWRENCE, J., puts the case on the right ground: "I agree," he says, "with the plaintiff's counsel, that whether the contract be by parol or under seal, the operation of the law on it is equally the same. When a ship is driven on shore it is the duty of the master either to repair his ship or to procure another, and having performed the voyage he is then entitled to his freight, but he is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owners of the goods prevent him; nor is he entitled *pro rata* unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action."

The case of *Hunter v. Prinsep*² is also an authority which, at first sight, may appear to conflict with that of *Luke v. Lyde*.³ A vessel, bound from Honduras to London, having been captured and recaptured, and taken by the recaptors into St. Kitts, was there wrecked, but the cargo was saved. The master, acting *bona fide* for the advantage of all concerned, but without orders or authority from the owner of the cargo, and apparently without any necessity arising from inability to forward the goods, having obtained an order from the Vice-Admiralty Court of the island, which order that court had no power to make, sold the cargo. The plaintiff, the owner of the cargo, having brought an action for money had and received against the shipowner to recover the amount of the proceeds, the defendants sought to set off the amount of freight *pro rata*. But Lord ELLENBOROUGH, delivering the judgment of the court of King's Bench, held that, inasmuch as by the terms of the charter-party, which was under seal, the freight was to be paid in particular modes and proportions, "on a right and true delivery of the cargo," no freight had become payable under the charter-party; and that, as the sale of the goods by the master, which had been made without the assent of the plaintiff, and without necessity, was un-

¹ 7 T. R. 381.² 10 East, 378.³ 2 Burr. 882.

lawful, and the conveyance of the goods to their destination had thus been rendered impossible by the tortious act of the master, the plaintiff, the freighter, could not be taken to have dispensed with the further conveyance of the goods according to the terms of the original contract.

It was more difficult to deal with the argument urged on behalf of the defendants, that, by bringing an action to recover the proceeds of the sale, the plaintiff would receive the equivalent of the goods, and therefore, virtually the goods themselves, and consequently became liable for the *pro rata* freight, as much as if he had received possession of the goods themselves on the spot. Nor, in my opinion, was any satisfactory answer given. It was not enough, as it seems to me, to say that the sale was tortious on the part of the master. By waiving the tort, and suing in assumpsit for the proceeds of the sale, the plaintiff became liable — certainly in point of justice, and, as it seems to me, in law — to the claim of the defendants for partial freight by way of set-off, just as much as if he had taken to the goods themselves and sold them where they were.

Lord ELLENBOROUGH, it is true, puts the matter on such a footing as would render it impossible ever to imply a dispensation by a freighter of performance of part of a voyage. "The general property in the goods," he says, "is in the freighter; the shipowner has no right to withhold possession from him unless he has either earned his freight" — by which the Chief Justice evidently means the entire freight — "or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession."¹ It is to be observed, however, that Lord ELLENBOROUGH does not seem to have had present to his mind the possibility of a case in which partial freight could be earned. In the case before him the ship had been taken out of her course as the result of her capture, and had been taken into St. Kitts by the recaptors. It is difficult to see how any freight could have been earned. The case of *Luke v. Lyde*² does not seem to have been dealt with by the court.

In the later case of *Vlierboom v. Chapman*,³ however, the question of *pro rata* freight presented itself as the point for decision, and a similar judgment was given under still more striking circumstances. A cargo of rice having been shipped at Batavia, to be delivered at Rotterdam, and the ship having been compelled by a hurricane to put into the Mauritius, the rice was found to have been damaged, and to be in a state of rapid putrefaction, and it was, therefore, as a matter of necessity, sold by the master, of course without the knowledge of the owner, whom at that distance it was, under the circumstances, impossible to consult. An action having been brought against the shipowner by the freighters to recover the proceeds of the sale, the defendant, though the action was in assumpsit, was held not to be entitled to set off the freight *pro rata*. I confess myself wholly unable to follow the reasoning of the court. It seems to have been

¹ 10 East, 394.

² 2 Burr. 882.

³ 13 M. & W. 230.

admitted that, as the goods must otherwise have perished, the master had authority, as agent of the shippers, to sell. Nevertheless, it was held that his thus dealing with the goods as agent for the freighters, although it might amount to an acceptance of the cargo by the latter, did not operate on their part as a dispensation of the conveyance of the goods to their destination, because, as the shipowner was not in a condition to carry it, it could not be supposed that the freighters would dispense with the performance.

Here, again, no notice is taken of the case of *Luke v. Lyde*,¹ in which, as I have before said, Lord MANSFIELD and the Court of King's Bench put the right to recover freight *pro rata*, not on any dispensation by the freighters, or new contract in substitution for the charter-party or bill of lading, but on the principle of maritime commercial law, that the merchant, if he takes the goods short of their destination, when the shipowner, without any default on his part, but through the operation of a *vis major*, is prevented from carrying them on, is bound, having had the benefit of their carriage so far, to pay freight *pro rata*.

The argument of Lord ELLENBOROUGH that, where the shipowner is unable to forward the cargo, and so to earn the freight, the right of the shipper to the possession of it at once arises without any corresponding right in the shipowner to freight *pro rata*, may hold where the circumstances give the master no authority to dispose of the goods. But it obviously becomes a very different thing where, the ship having become disabled, and the goods damaged, the duty is cast upon the master to dispose of the cargo in the interest of the owner of it.

The legal position of the master of a vessel, disabled from carrying on the cargo, at an intermediate port may be stated thus: If he desires to earn the entire freight he must cause the ship to be repaired, or send on the cargo in another vessel. But if he chooses to forego the freight, he is not bound to do either. The ship may be not worth repairing; the expense of hiring another ship may be greater than the freight to be earned. Having done his best to protect the goods, he may leave them to be dealt with by the owners, the only consequence being that he forfeits the freight. But it may be that the master has no option; that the ship is incapable of being repaired, and that no other can be procured, while the circumstances are such as to render it certain that it will not be worth the while of the owner of the goods, either owing to the locality or the distance at which they are found, or owing to their damaged condition, to send out a ship to bring them on; or it may be that the goods are perishable, and would become worthless by any delay. Under such circumstances, if the goods-owner cannot be communicated with, and his instructions taken, within such time as the master can reasonably be expected to wait, the latter, as the servant and representative of the shipowner, has cast upon him the

¹ 2 Burr. 882.

duty of acting for the goods-owner and disposing of the cargo to the best advantage. This obligation is tacitly implied in the charter-party or bill of lading, and, like every obligation to do a thing, involves an authority from the party to whose benefit the obligation enures to do the thing which is the subject-matter of the obligation. Where, therefore, the master, in disposing of the cargo, acts *bona fide* and with reasonable judgment and discretion, the goods-owner will be bound.

The law, as thus laid down by Lord STOWELL in the case of *The Grati-tudine*,¹ has since been universally acquiesced in. This being so, the position of Lord ELLENBOROUGH that, where the goods are not about to be carried on, possession may be demanded by the freighter, and if the demand be not yielded to, will be wrongfully withheld, appears inapplicable to the case of a master so circumstanced; and that of PARKE, B., that the ship-owner not being able to carry or send on the goods, it cannot be supposed that the shipper would waive the further conveyance of them, seems equally so, where the master is acting as the agent of both parties, and doing that which is most conducive to their common advantage. If the master, under these circumstances, becomes, to use the words of WILLES, J., in *Notara v. Henderson*,² the "agent of necessity" of the shipper, he becomes so as the servant of the shipowner, and by virtue of the original contract, which therefore must be taken to be still subsisting, though the goods cannot be carried on. If the law thus casts on him the duty of acting as agent for the shipper, it does not take from him the character of agent for the shipowner, or the duty of looking to the interest of the latter as well as to that of the former. If he becomes clothed with the character of agent for the goods-owner, he acquires authority to do what the latter, if on the spot, might do, namely, dispense with the further transport of the goods.

It is, moreover, clear that cases may occur in which it would be for the manifest advantage of the freighter that the goods should be sold, and the freight deducted: as, for instance, where the goods, being at an intermediate port, are found to have become so damaged that, if carried on to their destination, they will be worthless when they reach it, as was the case in *Notara v. Henderson*.³ That case is an express authority for saying, that the master may not carry on a damaged cargo, for the purpose of earning the freight, where the necessary effect will be the destruction or deterioration of the goods. In such case, at all events where the damage cannot be arrested at a reasonable expense of time or money, it becomes the duty of the master to sell; but it is obviously only equitable that if the master, as the agent of the shipowner, is prevented, in the interest of the shipper, from earning the entire freight at the expense of the cargo, the shipper, in consideration of the benefit he thus secures, shall at least pay the freight for so much of the voyage as shall have been performed.

The cases on which I have been commenting, if in point, are of course

¹ 3 Rob. Adm. 240. ² L. R. 7 Q. B. 230. ³ L. R. 5 Q. B. 346; 7 Q. B. 225.

binding on us, and can only be reviewed, as I hope they will be if the occasion should arise, in a Court of Appeal. But they do not go the length of overruling *Luke v. Lyde*.¹ All they do is to establish that where the master takes upon himself to sell the cargo without express authority from the shipper, though he may be perfectly justified in so doing, as the agent of the latter, by the circumstances in which he is placed, the shipowner cannot recover the *pro rata* freight. They do not touch the case in which the goods come to the hands of the owner short of their destination, and the owner has derived benefit from their conveyance so far, which is what has occurred in the case before us.

In deciding a question of English law, foreign law is, of course, of no authority. Nevertheless, as in a matter of commercial law it is of importance that the rules of commercial nations shall, as far as possible, be the same, it may not be unimportant to see what is the state of the Continental law on this subject. The law will be found in the French Code de Commerce, Article 296; in the Italian Codice di Commercio, at Article 403; in the Spanish Code, Articles 777 and 778; in the Code of the Netherlands, Article 478; in the Prussian Code, Articles 1701-6; in the Russian Code, Article 747; in the German Code, Articles 632, 633. The rule in all these is the same, namely, that the master of a disabled ship is bound, if his ship cannot be repaired, to procure, if possible, another to carry on the goods. If both are impossible, he may then abandon the goods to the owners, and will be entitled to his freight *pro rata*, or, as it is termed in the German law, the distance freight. The German law has, however, this qualification, that the freight payable shall not exceed the value of the goods.

In the present instance, the charterers having had the cargo brought from the Tees to within thirty miles of Taganrog, nothing could be more unjust than that the shipowner should receive nothing for the conveyance of it so far. And the principle of the decision in *Luke v. Lyde*¹ appears to me distinctly applicable.

But besides this, when the facts are closely looked at, an acceptance of the cargo at Kertch by the consignees, and a dispensation of the further conveyance of it, may properly be inferred.

Being prevented by the state of the navigation from taking the cargo on to its destination, the master was justified in landing and warehousing it at Kertch, provided he thereby put the charterers to no extra expense. He was not bound to wait with his ship, with the iron on board, till the navigation should be open, — a period of four months. All that could be required of him would be that he should bring on or forward the cargo as soon as the navigation should be again open. In the mean time he was at liberty to seek other new employment for his ship in the interest of his owner. The charterers could have no right to exact from him a useless inactivity of several months; nor, if this be so, can it make any difference

¹ 2 Burr. 882.

that the charterers in fact objected to the landing of the cargo. Their objection might have made all the difference if the cargo could have been brought on, but as that was impossible, no prejudice could result to them if not called upon to defray the extra expense. And even if put to such expense, they would always have had their cross claim against the shipowner on the freight.

The next important fact which occurs is, that, the cargo having been landed, the consignees come forward and claim it. But they were not entitled to have it delivered to them till it had been brought to Taganrog, unless it was abandoned by the master, or on the navigation being again opened, he refused to bring it on or to forward it; they could not insist upon delivery short of the port of destination without paying the entire freight, except by arrangement with the shipowner, or the master as his agent. Without paying the entire freight, or coming to such an arrangement, the consignees must have waited four months for the iron rails, which, being wanted for the construction of a railway, it was important to them to obtain without any delay.

When, under these circumstances, I find the consignees asking for the cargo, and the master compelled to give them possession of it, I cannot suppose that the master intended to forego, on the part of his owner, his claim to freight; or that the consignees, in accepting the iron at Kertch, intended to claim it, or understood that they were receiving it free from all claim of freight. The master might be glad to be relieved from all further difficulty as to forwarding the iron; the consignees would be glad to have present possession, so that they might send it by land carriage to Taganrog, instead of waiting four months to receive it by sea. The question of amount of freight payable — whether the whole or part — they left to be settled between shipowner and charterers in England. The master evidently thought he had earned the entire freight, for he believed that, having brought the cargo "as near as the ship could get" to the port of destination, he had done all he was bound by the charter-party to do. It is true that in landing the cargo under this mistaken impression the master had no intention of taking it on to Taganrog; but it appears that while he was in the course of landing the iron at Kertch the consignees applied for it, and it was delivered up to them, they giving a receipt for it, the master, on the other hand, insisting on payment of his freight. It seems to me that, under these circumstances, the consignees, who had no right to have the iron carried on to Taganrog till the navigation was again open, must be taken to have accepted it subject to the claim for freight *pro rata*. It is clear that the master had no intention of giving up the cargo without receiving his freight, for he protested against its being given up to the consignees by the authorities without the freight being paid. And, inasmuch as the consignees could not claim to have the cargo brought on to Taganrog till the navigation should be open, it is by no means certain that, if the cargo had

not been delivered over to the consignees, the shipowner, on learning what had occurred, would not, in order strictly to fulfil the terms of the charter and prevent all question as to the payment of the entire freight, have provided a vessel to take the iron on when the navigation was re-opened. And this would have been the more likely to happen, if the consignees, instead of demanding present delivery of the iron, had protested against its being left at Kertch, and had insisted on its being brought on to Taganrog when the navigation should admit of it. It is highly probable that the plaintiff would then have availed himself of the intervening period, and would have made his arrangements for bringing on the cargo. Of this *tempus pœnitentiæ* he was, as it seems to me, prematurely and unduly deprived by the act of the consignees, in obtaining the possession of the iron from the custom-house authorities.

It must be borne in mind as a material fact in this case, and one which distinguishes it from the cases of *Hunter v. Prinsep*¹ and *Vlierboom v. Chapman*,² that the master did nothing in the way of disposing of the cargo, or of abandoning it, so as to give up his lien on it for the freight. The cargo was given up to the consignees by the custom-house authorities, against the will of the master and notwithstanding his protest. The consignees could therefore, as it seems to me, only take possession subject to the rights of the captain and his owner, one of these rights being, unless clearly abandoned, that of forwarding the cargo when the time came, and so earning the entire freight. Here, again, it is by no means certain that, if the lien for freight claimed by the master had not been disregarded and the cargo handed over to the consignees, the owner would not in due time have sent it on to its destination.

Under these circumstances the case of *Luke v. Lyde*,³ which, as far as I am aware, has never been overruled, and which is binding upon us, appears to me to apply. In my opinion, though the charterers' agents protested against the landing of the cargo, yet the consignees, who as to the receipt of the cargo must be treated as the agents of the charterers, must be taken to have dispensed with the conveyance of the iron between Kertch and Taganrog, and to have accepted it subject to the right of the shipowner to freight for so much of the voyage as had been performed. I think, therefore, that to that extent our judgment should be for the plaintiff. But my learned Brothers think otherwise, and judgment must therefore be entered for the defendants.

The judgment of MELLOR and QUAIN, JJ., was delivered by

QUAIN, J. It is unnecessary to recapitulate the facts of the special case, which have been fully stated by the LORD CHIEF JUSTICE.

Under the circumstances the plaintiff contends, — first, that he is entitled to be paid full freight as on a performance of the whole voyage, or if not full freight, that he is entitled to be paid *pro rata itinervis* up to Kertch.

¹ 10 East, 378.

² 13 M. & W. 230.

³ 2 Burr. 882.

In the first place, we think that the master was quite mistaken in supposing that a delivery at Kertch was a delivery so near to Taganrog as he could safely get. According to the judgment of this court in *Schilizzi v. Derry*¹ the meaning of those words is, that the ship must get within the ambit of the port, although she may not be able to enter it. There is no pretence for saying that Kertch is within the ambit of the port of Taganrog.

It was next contended that the full freight was due, as the condition of the charter-party, on the performance of which it was made payable, had been complied with. By the terms of the charter-party the freight was to be paid, one third on signing the bills of lading, and the balance in cash in London against certificate of right delivery of the cargo.

It was argued that the receipt given by the consignees' agents, and set out in paragraph 17 of the case, was such a certificate. But we are of opinion, assuming that the consignees or their agents were the proper persons to give the certificate required by the charter-party, that the receipt is not a certificate of right delivery of the cargo within the terms of the charter-party, especially as against the present defendants, the charterers, who expressly protested against the discharge of the cargo at Kertch. It is merely an acknowledgment of having received the cargo, and is not the certificate of right delivery required by the charter-party.

It was further contended for the plaintiff that, as the consignees had taken possession of the cargo at Kertch, as described in paragraph 17, the whole freight was payable.

The case of *London & North Western Ry. Co. v. Bartlett*² was cited in support of this proposition. In that case it was held that the carrier of goods consigned to a particular place may deliver them at any other place that the consignee and the carrier may agree upon, and that in such case the carrier would be entitled to his full freight. So also in the case of *Cork Distilleries Co. v. Great Southern & Western Ry. Co.*,³ it was held by the House of Lords that where goods are delivered to a carrier to be carried to a certain person at a certain place, the consignees may demand the goods of the carrier at another place, and the carrier will be justified in delivering the goods on payment of the full freight.

But in these cases the carrier was ready and willing to carry the goods to their destination and earn his full freight; and refrained from doing so at the express request of the consignees. In the present case, on the contrary, the master discharged the cargo at Kertch without any request from the consignees, and against the express protest of the charterers, and refused to carry it further to its port of destination; and it was not till after this refusal, and when the goods may be said to have been abandoned by

¹ 4 E. & B. 873; 24 L. J. Q. B. 193.

² 7 H. & N. 400; 31 L. J. Ex. 92.

³ L. R. 7 H. L. 269.

the master, that the consignees took possession of them as holders of the bills of lading.

We think, therefore, that the cases cited have no application to the present case. It is said, in paragraph 19 of the case, that the cargo was "in due course" received by the railway company. But we cannot construe the language as intended to contradict or qualify the express statement in paragraph 17, describing the manner in which the cargo was received by the company.

It remains to consider the question whether the plaintiff is entitled to freight *pro rata itineris*, having carried the goods to Kertch. Claims of this kind usually arise in cases of disabled ships unable by the accidents of the seas to complete their voyage; and we are not aware of any case like the present, where the claim has arisen from the default of the master in refusing to proceed to his port of destination.

The rule on this subject was laid down by Dr. Lushington in the case of *The Soblovnsten*¹ as follows: "To justify a claim for *pro rata* freight, there must be a voluntary acceptance of the goods by their owner at an intermediate port, in such a mode as to raise a fair inference that the further carriage was intentionally dispensed with." And the learned judge cites the case of *Vlierboom v. Chapman*,² from the judgment in which case the rule is extracted in the words above quoted.

This case is founded on the earlier case of *Hunter v. Prinsep*.³ In that case Lord ELLENBOROUGH says that the shipowner has no right to any freight unless the goods are forwarded to their destination, "unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. . . ." He continues: "The general property in the goods is in the freighter; the shipowner has no right to withhold possession from him, unless he has either earned his freight or is going on to earn it." Applying these principles to the facts of the case before us, we feel bound to decide that in this case the claim for freight *pro rata* cannot be supported. This action is against the charterers on the charter-party, and so far from their having voluntarily accepted the goods at Kertch and dispensed with the further carriage of the goods to their port of destination, they gave the master express notice on the 19th of December, and before he had commenced to discharge the cargo (paragraph 12), that if he discharged the cargo at Kertch, that is to say, left it at Kertch without any intention of carrying it further, he would be held responsible for an infraction of the charter-party. It is impossible, therefore, as against the present defendants, to infer that they dispensed with the further carriage of the goods to Taganrog. The case, as far as the present defendants are concerned, is like *Liddard v. Lopes*,⁴ where a similar

¹ L. R. 1 A. & E. 297.

² 13 M. & W. 238.

³ 10 East, 378, 394.

⁴ 10 East, 526.

notice was given by the owners of the cargo, and it was held that no new contract to pay freight *pro rata* could be presumed against the merchant.

But assuming that defendants would be bound in this action by a voluntary acceptance of the goods by the consignees at an intermediate port, and a dispensation by them of the further carriage (a point about which we entertain considerable doubt, especially after the protest of the defendant's agents), we are of opinion that there has been no such acceptance in this case. In fact, the present case is one in which the master, by an unfortunate mistake, has left the goods at an intermediate port, and refused to carry them on to their port of destination, and it was not till after such refusal that the agent of the consignees took possession of them as holders of the bills of lading. They had no other course to pursue if they wished to preserve their own property. It is said, however, that the master claimed a lien on the cargo for freight, and protested against the agent of the consignees taking possession, and that by reason of the consignees so taking possession he and his owners were prevented from sending a ship and carrying on the cargo at the opening of the navigation. But the master had no lien for freight : for he had neither earned any freight nor was he going on to earn it ; and he having declared that he discharged the cargo at Kertch and did not intend to carry it further, the parties had a right to take him at his word and act on that declaration, and treat it as a breach of the charter-party, and to take possession of the cargo which the master had so abandoned. (See on this last point the *Danube Ry. Co. v. Xenos*,¹ *Frost v. Knight*,² and the cases there cited.)

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The case therefore seems to come within the third rule laid down by Dr. Lushington in the case of *The Soblomsten*,³ namely, that no freight is payable, if the owner of cargo against his will is compelled to take the cargo at an intermediate port.

It seems to us that the duty of the master was plain, in the absence of any fresh arrangement between the parties, either to wait at Kertch till the navigation was open and then proceed on his voyage, or to land and warehouse the goods at Kertch, and return and take them on by his own or another ship when the navigation was open.

For these reasons we are of opinion that the plaintiff is not entitled to recover any freight in this case, and that our judgment must be for the defendants.

We may observe, in conclusion, that the special case before us gives no information as to what ultimately became of the cargo of the *Meredith*. We are not told if it was ever forwarded to Taganrog either by the charterers or the consignees, nor how the transaction has been arranged, if it ever has been arranged, between the parties. We are therefore entirely ignorant whether in the result the present defendants, the freighters, ever

¹ 11 C. B. N.S. 152; 13 C. B. N. S. 825; 31 L. J. C. P. 84, 284.

² L. R. 7 Ex. 111.

³ L. R. 1 A. & E. 297.

derived any benefit or advantage whatever from the carriage of the cargo to Kertch. We cannot infer necessarily that they must have done so, for many cases are conceivable in which the leaving the cargo at an intermediate port might be of no benefit, but, on the contrary, cause a serious loss to the freighters.

In the jurisprudence of France and Germany the claim for freight *pro rata itineris* is not based on any such technical ground as a new contract to be inferred from a voluntary acceptance of the goods in such a way as to amount to a dispensation of their further carriage, but seems to be founded merely on the equity and reasonableness of the thing, that the shipowner who has carried the goods a part of the way, of which the freighter has had the benefit, should be proportionately indemnified: see Code de Commerce, Article 294-296, and Valin's Commentary on the Ordonnance de la Marine, Liv. iii. Tit. iii. Article 9. The German Code, Article 633, expressly provides that in calculating the amount of that indemnity the question is not one of distance merely, but that the circumstances of the case on both sides in relation to the performed and unperformed part of the journey, including the value of the goods at the intermediate port, must be taken into consideration: German Commercial Code, Articles 632, 633, and Makower's Commentary on the German Code, note 123.

Had it appeared from the case before us that the defendants in the present case, notwithstanding the master's failure to complete his contract, had in the result derived benefit and advantage from the carriage of the cargo to Kertch, either in the price received for the goods or otherwise, a question might have arisen whether we might not now be called upon to administer in favor of a shipowner who had carried the cargo to within thirty miles of its destination, and of which part performance the defendants had the benefit, some of that "larger equity" alluded to by Lord TENTERDEN as exercised by Courts of Admiralty in similar cases.¹ Lord TENTERDEN cites with approbation the judgment of Sir WILLIAM SCOTT in the case of *The Friends*,² in which that learned judge says: "This court sits no more than courts of common law do to make contracts between parties, but, as a court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction." Sir R. PHILLIMORE, in the case of *The Teutonia*,³ after citing this judgment, adds that this jurisdiction is not confined to prize cases, but that it is a part of the general power which the court always possessed.

However, as the point to which we have last adverted is not expressly raised by the case, we give no opinion on the subject.

Judgment for the defendants.

¹ Abbott on Shipping, 11th ed. 1867, pp. 402, 403.

² Edw. A. R. 247, 248.

³ L. R. 3 A. & E. 421.

BRUMBY v. SMITH.

IN THE SUPREME COURT OF ALABAMA, JUNE TERM, 1841.

[Reported in 3 Alabama Reports, 123.]

ERROR to the Circuit Court of Montgomery County.

This was an action of assumpsit commenced in the court below, by the defendant in error against the plaintiff in error.

The declaration contains a special count upon an agreement between the parties, and the common counts. The defendant below demurred to the special count of the declaration, which being overruled by the court, the jury under the general issue found a verdict for the plaintiff below. Pending the trial, a bill of exceptions was taken to the opinion of the court, by which it appears that an agreement between the parties in writing was offered in evidence, by which the defendant in error agreed to complete the carpenter's work on a house of the plaintiff in error, for the sum of \$437, to be paid when the work was completed, the materials to be furnished by the plaintiff in error.

It was proved, that a short time before the work might have been completed, the house was destroyed by fire; the materials having been furnished by the defendant below. Evidence was also offered, conducing to show that the defendant below, who was in possession of the house, caused the burning of the house by his neglect. || x

Upon this testimony, the defendant below moved the court to charge the jury, that if they believed from the evidence that the plaintiff had contracted according to the terms of the agreement, and that all the work specified in the agreement had not been done according to its terms, that the plaintiff could not recover for the work actually done by him, unless he had been prevented from the performance of it by the burning of the house and materials; they must also believe from the evidence, that the burning was occasioned by the acts or neglect of the defendant, or that the plaintiff could not recover for the work actually done; which charge the court refused to give, and charged that if the jury believed that a portion of the work had been executed by the plaintiff according to the terms of the contract, by which the defendant was to furnish the materials, that the plaintiff was entitled to recover the worth of the work actually done by him, on the materials so furnished, although the whole of the work specified in the contract had not been completed; and under the state of facts above supposed, the circumstance of the burning of the house or materials before the completion of the work, whether the fire was occasioned by the act or neglect of the defendants, or by any other means, without his agency, could not affect the right of the plaintiff to recover. To the refusal to charge,

and to the charge given, the defendant excepted, and now presents the questions of law which arise thereon, to this court for revision.

Goldthwaite for the plaintiff in error.

Dargan, contra.

ORMOND, J. As no objection was made to the judgment of the court overruling the demurrer to the first count, we have not thought it necessary to examine it.

It is certainly true, that when by the terms of a contract a given duty is to be performed, the performance is a condition precedent, and although performance may be prevented by inevitable accident, a *pro rata* compensation cannot be recovered for the services actually performed. Of this principle, the case of *Cutter v. Powell*¹ furnishes a full illustration.

The facts were, that Cutter shipped on board a vessel, as second mate, and received from the master the following obligation: "I promise to pay Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the ship Governor Parry, from hence to Liverpool." During the voyage, and before the ship arrived at Liverpool, Cutter died, and the action was brought by his administrator to recover the value of the services actually rendered. The court held, he could not recover on the ground, that performance was by the terms of the contract a condition precedent to a recovery, and that it was no answer to the objection that he was prevented by inevitable accident from performing his contract.

So, if a workman undertakes to build a house, to be paid on its completion, he cannot demand payment until he has complied with his contract, by building the house, and if it should be destroyed by inevitable accident, it will be his loss.

In this case, it was contended by the counsel for the defendant in error, that this was distinguishable from the class of cases we have been considering; that it was the hire of labor and services, as the employer was to furnish the materials, and that, "if while the work is doing, the thing perishes by internal defect, by accident or superior force, without any default of the workman, the latter is entitled to compensation to the extent of the labor actually performed."

Judge STORY, in his work on Bailment, at page 278, admits that the rule is as above stated, by the civil law, where there is no contract postponing the time of payment to the completion of the work, and such he intimates would be the rule at common law; that such is the rule of law, is shown by the case of *Menetone v. Athawes*,² which was an action by a shipwright, for work and labor done, and materials found, in repairing the defendant's ship. The facts were, the ship was in the dock of the plaintiffs, to be repaired, and when only three hours' work were wanting to complete the repairs, a fire happened in an adjacent brew house, was communicated to

¹ 6 T. R. 320.

² 3 Burr. 1592.

the dock, and the ship was destroyed. The dock belonged to the shipwright, and the owner of the ship had agreed to pay 5*l.* for the use of it. The plaintiff obtained judgment. In that case, it is to be observed, there was no contract to perform the work at a specific price, and the recovery was had on the implied promise to pay the value of the work and labor, and materials furnished. In this case, the defendant in error agreed to complete the carpenter's work on a house of the plaintiff in error, the materials to be furnished by the plaintiff in error; in consideration of which, he agreed to pay the defendant in error \$437, "to be paid when the work was completed." A few days before the completion of the work, the house was consumed by fire, whilst the plaintiff in error was in possession.

Here there was an entire contract, and although it was labor to be performed on materials furnished by the employer, yet by its express terms, the labor was not to be paid for until the work was completed; and if this is rendered impossible, without the act of the employer, there can be no recovery for the work actually done.

Mr. Justice STORY, after examining this question at some length, comes to the same conclusion. "It would seem," he says, "that by the common law, in such a case, independent of any usage of trade, the workman would not be entitled to any compensation; and that the rule would be, that the thing should perish to the employer, and the work to the mechanic; for the contract by the job would be treated as an entirety, and should be completed before the stipulated compensation would be due."¹

From these considerations, it appears that the judge erred in his charge to the jury, and the judgment is, therefore, reversed, and the cause remanded.

planned with state for building of Gen. Val. Canal & subcontracted a part of excavating work to J. J. Jones, to whom it was stipulated to be paid 10% of which would be held back until the last pay, in order to insure the completion of the work. State just now sued to the Court with J. J. by act of Legislature, &c. for the sum of \$100, yet does not move for the same.

JONES AND JONES v. JUDD.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER, 1850.

[Reported in 4 Comstock, 412.]

JAMES JONES and Edward Jones sued Judd in the Common Pleas of Cattaraugus county, for the price of work and labor. The defendant contracted with the State to complete certain sections of the Genesee Valley Canal. On the 14th of September, 1840, he entered into a sub-contract with the plaintiffs for a part of the same work, by which he agreed to pay them seven cents per yard for excavating and eight cents for embankment, monthly, according to the measurement of the engineers, except ten per cent which was not to be paid until the final estimate. The work on the canal, including that on which the plaintiffs were engaged, was stopped by

¹ Story on Bailment, 278, § 426, b., 2d Ed.

the canal commissioners on the 21st day of June, 1841, before they had completed their job, and they never finished it. On the 29th of March, 1842, the legislature passed the act "to preserve the credit of the State," which put an end to the original contract between the defendant and the State, and before the commencement of this suit that contract had expired by its own limitation. The defendant paid the plaintiffs for all the work performed by them except the ten per cent reserved, which amounted to \$85.30, which sum the plaintiffs claimed to recover.

The defendant moved for a nonsuit on the ground, among others, that without a waiver of full performance of the contract, or without some act of his to prevent the performance, the plaintiffs could not recover. The motion was overruled. The defendant then proved that the work actually done by the plaintiffs under the contract was worth only five cents for embankment and seven cents for excavation. He offered also to prove what the cost of the work not done would be, and that the excavation and embankment not done would be more difficult and expensive than the portion completed. This evidence was objected to and excluded. The referees before whom the trial was had reported in the plaintiffs' favor for the sum claimed. The Common Pleas confirmed their report, and rendered judgment thereon, which was affirmed by the Supreme Court, on error brought. The defendant appealed to this court.

M. B. Champlin for appellant.

W. P. Angel for respondents.

GARDINER, J. The plaintiffs were stopped in the prosecution of the work, in fulfilment of their contract, by the authority of the State officers. Before this injunction was removed, the law of March 29, 1842, for preserving the credit of the State, was passed, which put an end to the original contract, and the agreement between the plaintiffs and defendant which grew out of it. 3 Mass. 331; *Doughty v. Neal*; ¹ 10 Johns. 28.

As the plaintiffs were prevented, by the authority of the State, from completing their contract, they are entitled to recover for the work performed, at the contract price. The ten per cent was a part of the price stipulated. It was reserved to secure the fulfilment of the contract, and to be paid upon a final estimate. The performance of the required condition became impossible by the act of the law, and of course the plaintiffs were entitled to recover without showing a compliance with the agreement in this particular.²

Upon the question of damages; I think the offered evidence was properly rejected. If the contract had been performed by the plaintiff, he might have recovered upon the special agreement, or upon the common counts, and in either case he would be entitled to the price fixed by the agreement. Phil. Evid. 109, 2d Ed.; *Dubois v. Del. & H. Canal Co.*³ If the performance had been arrested by the act or omission of the defendants, the

¹ 1 Saund. R. 216, note b, 5th Ed.

² Comyn on Cont. 50; 10 Johns. 36.

³ 4 Wend. 280, and cases cited.

plaintiff would have had his election, to treat the contract as rescinded, and recover on a *quantum meruit* the value of his labor, or he might sue upon the agreement, and recover for the work completed according to the contract, and for the loss in profits or otherwise which he had sustained by the interruption. *Linningdale v. Livingston*; ¹ 9 B. & C. 145; *Masterton v. The Mayor of Brooklyn*.² In this case the performance was forbidden by the State. Neither party was in default. All the work, for which a recovery is sought, was done under the contract, which fixed a precise sum to be paid for each yard of earth removed, without regard to the difficulty or expense of the excavation. If the plaintiffs had commenced with the more expensive part of the work, they could not, under the circumstances, have claimed to have been allowed for the profits to arise from that portion which they were prevented from completing. Such an allowance is predicated upon a breach of the contract by the defendant.³ The defendants, in the language of Judge BEARDSLEY, "are not by their wrongful act to deprive the plaintiff of the advantage secured by the contract." Here, there was no breach of the agreement by either party. The plaintiffs could not recover profits, and the defendant cannot, consequently, recoup them in this action. *Blanchard v. Ely*.⁴

Again: the plaintiffs assumed the risk of all accidents which might enhance the expense of the work, while the contract was subsisting: *Boyle v. Canal Co.*; ⁵ *Sherman v. Mayor of New York*,⁶ and are entitled, consequently, to the advantages, if any, resulting from them. The suspension of the work by State authority was an accident unexpected by either party. It was one which, under the offer, we are bound to assume, was of benefit to the plaintiffs. But the defendant cannot require an abatement from the agreed price, for what has been done, unless he could demand it in case a flood had partially excavated or embanked the section of the canal to be completed by the plaintiffs. The judgment must be affirmed.

JEWETT, HURLBUT, and PRATT, JJ., concurred.

BRONSON, C. J., RUGGLES, HARRIS, and TAYLOR, JJ., were for reversal, on the ground that the evidence offered upon the question of damages was improperly excluded.

Judgment affirmed.

¹ 10 Johns. 36.

² 7 Hill, 69, 75.

³ 7 Hill, 71, 73.

⁴ 21 Wend. 346.

⁵ 22 Pick. 384.

⁶ 1 Const. 321.

There is no error in the case & is wrong.

DANIEL LORD v. BENJAMIN WHEELER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1854.

[Reported in 1 Gray, 282.]

ACTION OF CONTRACT. Writ dated October 20, 1851. Trial in the Court of Common Pleas, before BISHOP, J., to whose instructions the defendants alleged exceptions. The opinion exhibits the whole case.

E. Blake for the defendant.

B. Poul for the plaintiff.

THOMAS, J. This is an action of contract; the plaintiff alleging that the defendant owes him for work done and materials furnished in repairing a house and outbuildings, known as Taft's Hotel, at Point Shirley. The defendant's answer sets up a special contract in writing to do the entire work for a given sum, payable in two instalments; alleges the payment of that which had already become due, and denies his liability to pay the second, because the work was never completed; the buildings, before the repairs were finished, having been destroyed by fire. The plaintiff's replication alleges that the repairs on the house were nearly done; and that, before the fire took place, the defendant, by his tenant, entered into the use and occupation of the house. The report of the auditor finds such to be the fact. The defendant contended that the destruction of the buildings by fire did not constitute a sufficient excuse for the failure of the plaintiff to complete the remainder of the repairs; and that, if it did, the plaintiff could not recover for a partial performance, under this declaration. The presiding judge instructed the jury, that the fire was a sufficient excuse for the failure to complete the remainder of the repairs; and that for the part performed the plaintiff was entitled to recover under the present declaration.

We think the instructions, applied, as all instructions should be, to the facts in evidence, and the grounds assumed by the parties respectively, were correct. The plaintiff was excused by the fire from the further performance of his contract. The case may be clearly distinguished from the ordinary contract of one to erect a building upon the land of another, performing the labor and supplying the materials therefor, where, if, before the building is completed or accepted, it is destroyed by fire or other casualty, the loss must fall on the builder. He must rebuild. The thing may be done and he has contracted to do it. It is otherwise, where one person agrees to expend labor upon a specific subject, the property of another, as to shoe his horse or slate his dwelling-house. If the horse dies, or the dwelling-house is destroyed by fire, before the work is done, the

performance of the contract becomes impossible, and with the principal perishes the incident.

It by no means follows that, if the work is partially done when the casualty occurs, a party having contracted to do the entire work for a specific sum can recover for the partial performance. It may well be that both must lose, the one his labor, and the other the thing on which it has been expended. And the precise ground on which the plaintiff can recover in this case is, that, when the repairs upon the house were substantially done, and before the fire, the defendant by his tenant entered into and occupied it, and so used and enjoyed the labor and materials of the plaintiff; and that such use and enjoyment were a severance of the contract, and an acceptance *pro tanto* by the defendant. And the instruction of the presiding judge, not as stating an abstract proposition of law without reference to the evidence, but as giving a practical rule for the guidance of the jury upon the facts before them, was correct. For the partial performance, upon the facts of this case, the plaintiff might recover.

The defendant contends that the plaintiff cannot recover under this declaration, which is for work done and materials furnished; that he should have declared on the contract for the partial performance, and alleged his excuse for failing to perform the remainder. Though, under the Rev. Sts. c. 100, § 22, and the Sts. of 1851, c. 233, §§ 42, 43, and 1852, c. 312, §§ 32, 33, the objection would seem to be of no great practical moment, it is not free from technical difficulty. But we are of opinion that under the practice act, St. 1851, c. 233, § 2, there was a substantial statement of the facts necessary to constitute the cause of action.

Exceptions overruled.

WOLFE, EXECUTOR, ETC. v. HOWES, IMPLEADED, ETC.

IN THE COURT OF APPEALS OF NEW YORK, SEPTEMBER TERM, 1859.

[Reported in 20 New York Reports, 197.]

APPEAL from the Supreme Court. The complaint contained the common counts only for work, labor, and services done by Nicholas Vache, the testator, for the defendants. The defendants denied the facts averred in the complaint, and set up as a separate defence that the work was done under a special contract not performed by Vache in his lifetime, and claimed damages for the breach of the contract on his part. The defendants had for nine years previous to May, 1852, been engaged as partners in carrying on the business of making glass at the Dunbarton glass-works, of which they were the proprietors, at Verona in the county of Oneida. The testator was in the employment of the defendants at their glass-works as a pot-

maker. On the 1st of May, 1852, the defendants and testator entered into a contract in writing as follows:—

Memorandum of an agreement made this day. Howes, Scofield & Co. [defendants], of the first part, and Nicholas Vache of the second part, Witnesseth, That for and in consideration of \$1 to me in hand paid, the receipt whereof I do acknowledge, do agree on my part to do all the pot-room work for said parties of the first part, in a good and workmanlike manner for one year from the date of this contract, at the price of \$40 per month, \$10 of which is to be paid me monthly. Dunbarton, May 1, 1852. If extra help is needed, we agree to furnish it.

(Signed)

NICHOLAS VACHE.

The trial was before a referee, who found the following facts: The plaintiff's testator entered upon the performance of the contract, and continued to fulfil it in all respects according to the terms thereof, in a good and workmanlike manner, from the 1st day of May, 1852, to the 7th day of December, following, when Vache became sick and unwell, and so continued for a long time, and at length died. By reason of his said sickness, and without fault on his part, he became and was incapable of further performance of his said contract.

He held as matter of law, that by reason of his sickness and death, Vache was released and discharged from the further performance of his contract, and his executor was entitled to recover a reasonable compensation for the services of his testator.

That such reasonable compensation was the sum of \$40 per month, for the time of the testator's service; and after deducting certain payments made to him from time to time, there was a balance due of \$159.28, for which he ordered judgment with costs. The defendants took several exceptions to the finding of the facts and the decisions of the referee on the questions of law, and particularly to the conclusion that Vache was released and discharged from further performance of the contract, and that the plaintiff was entitled to recover a reasonable compensation for the services rendered by his testator for the defendants, and in not allowing a sufficient amount of set-off. The Supreme Court, at general term in the fifth district, having affirmed the judgment entered on the report of the referee, the defendants appealed to this court.

Timothy Jenkins for the appellants.

Francis Kernan for the respondent.

ALLEN, J. There can be little doubt, I think, that the contract with Vache contemplated his personal services. This is evident both from the nature of the business and the amount of compensation agreed to be paid him. It is also manifest from the evidence on both sides. The business of pot-making required skill and experience. It was an art to be acquired after much study and labor, and which Vache seemed to have accomplished.

The execution of the work required his constant and personal supervision and labor. No common laborer could have supplied his place, and hence the amount of his wages was largely increased beyond that of such a hand. The extra help mentioned in the contract had reference to the breaking away of the flattening, so called, and to its repair, and nothing else. The whole testimony shows this, as well as that the personal services of Vache were contracted for. The referee therefore well found and the court below well decided that such were the terms of the contract.

2. The question is then presented whether the executor of a mechanic, who has contracted to work for a definite period, and who enters upon his labor under the contract, and continues in its faithful performance for a portion of the time, until prevented by sickness and death, and without any fault on his part, from its final completion, can recover for the work and services thus performed by his testator.

The broad ground is taken on the part of the defendants' counsel, that no recovery can be had under such circumstances; that full performance was a condition precedent to the right of recovery, the agreement being general and absolute in its terms, and not providing for the contingency of sickness or death.

It has undoubtedly been long settled as a general principle, both in England and in this as well as in most the other States, that where the contract is entire, nothing but the default of the defendants will excuse performance. It will be found, however, on an examination of the leading cases in our own courts, that the failure to perform was owing to the fault or negligence of the party seeking to recover. *McMillan v. Vanderlip*; ¹ *Reab v. Moor*; ² *Jennings v. Camp*; ³ *Sickels v. Pattison*; ⁴ 8 Cow. 63, and various other cases. It is believed that not a single case can be found where the rule is laid down with such strictness and severity as the defendants' counsel asks for in the present case.

Some of the English cases do indeed rather intimate such a doctrine. *Cutter v. Powell*; ⁵ *Appleby v. Dods*; ⁶ *Hulle v. Heightman*; ⁷ and some others. These cases are, however, capable of the same reasonable construction which the law confers upon all contracts. That of *Cutter v. Powell* is distinguishable in this, that by the peculiar wording of the contract it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life and to render at all hazards his personal services during the voyage, before the completion of which he died.

The great principle upon which the adjudged cases in all the courts is based, is the question, as stated in *McMillan v. Vanderlip*, already cited, What was the real intention of the parties? The law gives a reasonable

¹ 12 Johns. 165.

² 19 Johns. 337.

³ 13 Johns. 94, 390.

⁴ 14 Wend. 257.

⁵ 6 T. R. 320; 8 T. R. 267.

⁶ 8 East, 300.

⁷ 2 East, 145.

construction to all contracts. For instance, in the present case, did the parties intend that the contract should be binding upon the plaintiff's testator in case of unavoidable sickness or death; or did they intend, and is it to be implied, that each should perform, as to the other, according to the terms of the contract, *deo volente*? It appears that a fair and legal interpretation would answer this question in the affirmative, and that such a provision must be understood as written in the contract. Nor is this principle wanting sanction either by elementary writers or adjudged cases. "Where the performance of a condition is prevented by the act of God, it is excused." Cruise Digest, Condition, 41, 43; 3 Kent Com. 471; 2 Kent Com., 509; 8 Bing. 231. In *Mounsey v. Drake*,¹ the court say, "Performance must be shown, unless prevented by the act of God or of the law." 1 Shep. Touchstone, 180; Gilbert on Covenants, 472; *People v. Manning*; ² *People v. Bartlett*; ³ 12 Wend. 590; Chit. on Con., 631; 1 Parsons on Con., 524, and note; 11 Vt. 562; 11 Met. 440.

There is good reason for the distinction which seems to obtain in all the cases, between the case of a wilful or negligent violation of a contract and that where one is prevented by the act of God. In the one case, the application of the rule operates as a punishment to the person wantonly guilty of the breach, and tends to preserve the contract inviolable; while in the other, its exception is calculated to protect the rights of the unfortunate and honest man who is providentially and without fault on his part prevented from a full performance.

There is another reason for relaxing the rule, which is applicable to the case we are now considering. It is well set forth in Story on Bailments,⁴ where that learned jurist, after considering the great number of cases on this subject in the various courts of England and this country, and well observing that they are not at all times in harmony, remarks that the true rule may be considered to be, "that where the contract is for personal services which none but the promisor can perform, there inevitable accident or the act of God will excuse the non-performance, and enable the party to recover upon a *quantum meruit*. But where the thing to be done or work to be performed may be done by another person, then all accidents are at the risk of the promisor." In the present case the finding shows, and I have already remarked, justly, that the contract was personal, and that the executor could not have employed a third person to execute the contract on the part of his testator Vache.

But without pressing this point further, it is sufficient to say that it was virtually decided against the defendants by this court, in the case of *Jones v. Judd*.⁵ It was there decided that when, by the terms of the contract for work and labor, the full price is not to be paid until the completion of the work, and that becomes impossible by the act of the law, the contractor is

¹ 10 Johns. 27, 29.² 8 Cow. 297.³ 3 Hill, 570.⁴ § 36, and notes.⁵ 4 Const. 411.

entitled to recover for the amount of his labor. In that case the work was stopped by the State officers in obedience to an act of the Legislature suspending the work; and the court held that as the contractor was without fault, he was entitled to recover. The case in 10 Johns. 27, before cited, was referred to and approved of as authority in favor of the position; and see *Beebe v. Johnson*.¹

The conclusion, then, is, that where the performance of work and labor is a condition precedent to entitle the party to recover, a fulfilment must be shown; yet that where performance is prevented or rendered impossible by the sickness or death of the party, a recovery may be had for the labor actually done. This is not out of harmony with principle or adjudged cases, and is certainly in harmony with the rules of common honesty and strict justice. x held.

These views dispose of the main questions in the case. It is necessary to notice one or two of minor importance.

It is insisted that if sickness were an excuse for the non-performance of the contract on the part of Vache, that such excuse should have been alleged in the complaint, and this not having been done, that the plaintiff is not entitled to recover. It is true that the plaintiff might have set up the agreement and the excuse for its non-performance, and entitled himself to recover upon such a pleading. But the complaint proceeds upon a *quantum meruit*; and upon showing the work and labor of Vache the plaintiff entitled himself to recover. The defendants set up the special agreement as matter of defence, and the plaintiff's excuse was properly enough matter of reply. The contract was in fact discharged by the act of God, and its chief consequence was to measure the amount of the plaintiff's damages, or to regulate the compensation to which the plaintiff was entitled, though his remedy was as upon a *quantum meruit*. So say some of the cases already cited.

Again, it is said that if the plaintiff was entitled to recover anything, it could be only \$10 a month, and that the defendants' set-off having been found by the referee to amount to more than that, the defendants were entitled to judgment. This objection is not tenable. The compensation was to be at the rate of \$40 per month; \$10 (a part) of which was to be paid monthly. This was upon the supposition that the contract was to be performed for the whole time. This, however, having been rendered impossible, the plaintiff was entitled to recover, if anything, the full value of the services of the testator, not exceeding the rate of compensation secured by the terms of the contract.

It is further urged that the referee erred in not allowing defendants' damages accruing to them after Vache was sick and before he quit. That was a question of fact entirely for the referee. He found that the plaintiff did his work well and skilfully, down to the time of his sickness; he al-

¹ 19 Wend. 502.

lowed and deducted the whole amount of set-off proved by defendants; and he does not find that the defendants sustained any damages by reason of any defect in Vache's work down to the time of his quitting, in December, 1852. With these questions of fact we cannot interfere. The court below sanctioned the finding. I think they were fully warranted in so doing. At all events, we are not at liberty to interfere.

The judgment must be affirmed.

JOHNSON, C. J., concurred, observing that it was material that the defendants had received actual benefit from the services of the plaintiff's testator, and that quite a different question would be presented by a case where the services actually rendered should prove valueless; as, *e. g.*, if one should be retained to compose an original literary work, and having faithfully employed himself in preparation, should die without having completed any work of value to the employer. COMSTOCK, J., and other judges concurred in this qualification.

*Judgment affirmed.*¹

NIBLO *v.* BINSSE.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER, 1864.

[*Reported in 3 Abbott's Appeal Decisions, 375.*]

WILLIAM NIBLO, as assignee of Anthony E. Hitchings, sued John Binsse and Louisa La Farge, executors of John La Farge, in the Supreme Court, for services and materials under a contract with the defendants' testator.

The referee found the following facts.

Hitchings agreed with the testator, by contract dated April 14, 1853, that Hitchings should, by October, 1853, furnish and set up in the La Farge House and Metropolitan Hall, then building by testator in the city of New York, steam-engines, pumps, and heating apparatus, etc., pipes and coils, under superintendence of an architect named, for which the testator was to pay him ten thousand dollars; as follows: seven thousand five hundred dollars in instalments, as certain parts of the work should be completed; fifteen hundred dollars when all was finished, and the balance when the work was "tested and found to be sufficient according to the provisions of this contract;" said payments to be on the certificate of the architect that they were due according to the agreement.

Hitchings began the work, and continued in the execution of it until Jan. 7, 1854, when the whole buildings were destroyed by fire without any

¹ It was held in *Lakeman v. Pollard*, 43 Me. 463, that one who refused to perform a contract of service because of the prevalence of cholera in the vicinity, could recover on a *quantum meruit* for the value of services rendered. — Ed.

fault upon the part of La Farge or of Hitchings. La Farge had in the mean time paid Hitchings, on account of the work, seven thousand five hundred dollars, without any certificate of the architect. Of this sum one thousand dollars was paid Oct. 24, 1853, and fifteen hundred dollars on Dec. 15, 1853, while the work was going on, but after the time when it was to have been finished, by the terms of the contract. At the time of the fire the work and materials necessary to complete the contract would have cost about one thousand dollars. Previous to the fire the concert room had been used for concerts several times, and when so used was heated by the apparatus Hitchings had put in ; but the hotel had not been opened for guests.

After the fire La Farge retained for his own use the remains of the iron pipe which was put into the building by Hitchings, and sold same to the latter for one thousand dollars.

Hitchings assigned to the plaintiff his claim to recover the balance of the ten thousand dollars, to be paid by the terms of the contract for the whole work ; whereupon the plaintiff brought this action. The referee decided in favor of the defendants, because the work was never fully completed ; and judgment accordingly was entered, from which the plaintiff appealed.

The Supreme Court, at general term, affirmed the judgment, holding that Hitchings was in default by not having finished the work according to the contract, and that his failure to perform was not due to the act of God, of the law, or of the other party, and that the plaintiff's assignor should have provided against such a contingency by a clause in the contract. Reported in 44 Barb. 54. From this judgment plaintiff appealed to this court.

E. P. Cowles and *W. F. Allen* for plaintiff, appellant.

T. J. Glover for defendants, respondents.

By the Court. — *T. A. JOHNSON, J.* It was held, both by the referee and the Supreme Court at general term, that the plaintiff was not entitled to recover, merely because the work was not finished and the job completed at the time the building, upon which the work was being done, was destroyed by fire. To my mind, this is a very plain case in favor of the plaintiff. The decision, very properly, was not put upon the ground that the work was not completed within the time specified in the agreement, but upon the naked ground that the contractor, having failed to do all the work he had contracted to do, could not maintain the action. It is plain, upon the facts found, that the time of performance had been extended by the mutual assent of the parties to the contract. When the time expired the agreement was not rescinded or terminated by the owner of the building, but the contractor was allowed to go on under it, and in performance of it, until the building was destroyed by the fire. Payments were made in the mean time, and the contract treated as in all respects in force by both parties. The work was in progress, and nine-tenths of the labor and expense had

been performed and incurred when the further prosecution of the work was arrested and its completion prevented by the destruction aforesaid. The case is to be treated, therefore, precisely as though the destruction of the building had occurred before Oct. 1, 1853, when by the terms of the contract the work should have been finished. No principle of law is better settled than this, that when one party has, by his own act or default, prevented the other party from fully performing his contract, the party thus preventing performance cannot take advantage of his own act or default, and screen himself from payment for what has been done under the contract. The law will imply a promise on his part to remunerate the other party for what has been done, and support an action upon such implied promise.¹

This case falls exactly within this principle of law. Through whose default was it that the work was not completed according to the contract? Certainly not that of Hitchings, the contractor; for he was ready and willing, and was in act of performing, when prevented by the destruction of the building. He was a mere laborer upon the building, having no possession or control over it for any other purpose; and the destruction of it was through no act or agency of his. Manifestly the performance of the contract was prevented by the default of the other party, who furnished and provided the building upon which the work was to be done, as far as the work had progressed, but failed to furnish or provide it for the completion of the work. It was his building, in his possession, and under his exclusive control; and, as a material and substantive part of his contract, he was to have it in existence ready for the work, and continue it in existence, and in a proper condition for the work to be performed upon it, as long as it was necessary under the contract, or as long as the contract was continued in force by the consent of the respective parties. If one party agrees with another to do work upon house, or other building, the law implies that the employer is to have the building in existence upon which the work contracted for may be done. It is necessarily a part of the contract on the part of such employer, whether it is specified in it in terms or not. Here the defendant's testator failed to provide and keep the building till the work could be completed, and thus — and thus only — was performance prevented.

It is nothing whatever to the case to say that the building was not destroyed through his agency or fault. That fact is no test of the liability in an action like this. It would not excuse or shield the defendants from liability, even were the action to recover as damages the profits which might have been made on that part of the work, the performance of which was prevented. The destruction was not caused by the act of God, as appears by the facts found; and a default from any other cause will not excuse non-performance.

¹ 2 Pars. on Cont. 35.

This rule was applied and enforced by this court in *Tompkins v. Dudley*,¹ very properly, undoubtedly, though the case was a very hard one for the defendants. The school-house which they had contracted to build, was substantially finished, according to the contract, but it had not been accepted by the plaintiffs, a small amount of painting and the hanging of the window-blinds remaining to be done, before the job was finished. In this situation the house took fire and was destroyed, and the plaintiffs were allowed to recover back moneys they had advanced on the contract, and damages for its non-performance. It was a casualty not provided against in the contract, which the defendants had bound themselves fully to perform. This rule, it will be seen, applies with full force against the defendants in this action, but in no respect is it applicable to the plaintiffs. The defendant's testator was to provide the building in which the work was to be done. That was part of his obligation, and he had not provided for the contingency of its accidental destruction during the continuance of the work, by his agreement. The plaintiffs' assignor had no occasion to provide, in the contract, for the default of the other party in the performance of his part of the obligation. The law provides for that. It was never heard that the contract must provide against the default of a party, in order to give a remedy to the other party who is affected injuriously by it; unless, indeed, some extraordinary remedy is sought, which the law, without an express stipulation, does not give. The obligation of the defendant's testator seems to have been entirely overlooked in the Supreme Court, or else it was assumed that the destruction of the building did not place him at all in default, unless he had some agency in such destruction, by which the performance was prevented. This I regard as a fallacy, and it is this, obviously, which produced the erroneous judgment against the plaintiff.

The case of *Menetone v. Athawes*² is very much in point here. The plaintiff was employed to make certain specified repairs upon a vessel lying at his own ship-yard. Before the repairs were completed, a fire broke out in a neighboring store, and extended to the vessel and destroyed it. The defendant in that case, as in this, contended that the plaintiff could not recover, because his agreement to repair was not fully performed. But it was held, that the plaintiff was entitled to recover, *pro tanto*, for the work and materials, as far as he had gone in the performance of his undertaking. This seems to be the settled rule in all cases between bailor and bailee, when the article is delivered to the latter, to be repaired or wrought into new form, and is accidentally destroyed before the work is finished and ready for delivery, without the fault of the mechanic. The loss in such case falls upon the owner of the article, and he must answer for the labor already bestowed and the materials, if any furnished. 2 Kent Com. 590; *Story on Bailm.* § 426, a; *Gillett v. Mawman*.³ It may perhaps be different

¹ 25 N. Y. 272.² 3 Burr. 1592.³ 1 Taunt. 137.

in such a case, where the work is done upon an express contract as a job, because the owner by delivering the article to the mechanic has done all he could do. He has performed so far all that was within the contemplation of the parties, and all the law could require of him, and it would be impossible for the mechanic in possession to allege that he was prevented from performing by any act or default of the owner. See *Story on Bailm.* § 496, b. His non-performance in that case not being occasioned by the act or default of the other party, it is difficult to see how, according to our rule, he could maintain the action. But it is manifestly entirely different where the owner of the property retains possession and contracts for work to be done upon it while in his own custody. In such case there is an implied obligation resting upon him to have it on hand and in readiness for the labor to be performed upon it. That is the case put by *WILMOT, J.*, in *Menetone v. Athawes*,¹ "of a horse which a farrier is curing, and which is burned in the meanwhile in the owner's own stable," as one in which the owner would undoubtedly be liable for the skill and care bestowed. The work is not completed, because the owner, whose duty it is to keep the article on hand in order to receive the labor and skill upon it, fails to do so, and is in default. That is this case, in effect. The difference in the nature of the property upon which the work was to be performed does not affect the principle.

When full performance is prevented by the authority of the State, the party may recover for his labor and materials, up to the time the State interferes and stops the work. *Jones v. Judd*.² I lay no stress whatever upon the fact that the owner used the building more or less while the work was in progress, because in this State the rule is well settled that use and occupancy constitute no ground of liability if the contract is not performed. *Smith v. Brady*.³ And if the non-performance was occasioned by the act or default of the other party, use and occupancy are of no moment. Nor is it of any consequence, in my judgment, that the defendant's testator kept the iron pipes which the other party had placed in the building, and sold them after the fire. They were clearly his property, made so by being placed in his building under the contract. And his using them or disposing of them after the destruction of the building does not, in any way that I can perceive, affect the question of his liability.

I rest the right of the plaintiff to maintain his action distinctly upon the ground that his assignor was prevented from performing his contract by the default of the other party in failing to keep on hand and in readiness the building in which the work was to be done, and that the other party was clearly in default whether the building was destroyed with or without fault on his part. If these views are correct, the action should have been sustained, and the plaintiff allowed to recover for his labor and materials according to the contract, as far as he had gone, deducting the amount

¹ 3 Burr. 1592.² 4 N. Y. 411.³ 17 N. Y. 173.

paid, and perhaps any damages which the owner may have sustained in consequence of the non-performance by the time stipulated in the contract. The judgment must, therefore, be reversed, and a new trial granted, with costs to abide the event.

All the judges concurred.

Judgment reversed, and new trial ordered, costs to abide the event.

CLEARY v. SOHIER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL 5, 1876.

[Reported in 120 Massachusetts Reports, 210.]

CONTRACT on an account annexed to recover \$474, with interest, for work done and materials furnished. The case was submitted to the Superior Court, and to this court on appeal, upon an agreed statement of facts in substance as follows:—

The plaintiff made an oral contract with Henry Farnum, of whose estate the defendants are trustees, to lath and plaster a certain building on Federal Street for the sum of forty cents per square yard. No agreement was made, and nothing was said, as to terms or times of payment, but only that the work was to be done for forty cents per yard. The plaintiff lathed and put on the first coat of plaster a few days before the great fire of November, 1872, and was ready and willing and in good faith intended to put on the second or skim coat, so called, and would have begun November 11, so to do, when the fire of November 9 and 10 wholly destroyed the building. There was no negligence, default, or bad faith on the part of either of the parties, and the fire was an unavoidable casualty. The amount charged by the plaintiff, to wit, \$474, is a reasonable and proper charge for the part of the work done; and, if the plaintiff is entitled to recover anything, as matter of law, under these facts, he is entitled to recover that sum and interest from November 10, 1872. The plaintiff did not demand said sum until after the fire, and not till some months thereafter, and did no more work under the contract. Farnum died soon after the fire, and the defendants represent him and his estate, and are liable if he was liable.

If the plaintiff was entitled to recover, either under his contract or under account for work done and materials furnished, judgment was to be entered for the said sum of \$474 and interest; otherwise, for the defendants.

The Superior Court ordered judgment for the defendants; and the plaintiff appealed.

B. E. Perry for the plaintiff.

C. P. Gorely for the defendants.

By the Court. The building having been destroyed by fire without fault of the plaintiff, so that he could not complete his contract, he may recover under a count for work done and materials furnished. *Lord v. Wheeler*¹; *Wells v. Calnan*.²

Judgment for the plaintiff.

NEW YORK LIFE INSURANCE COMPANY *v.* STATHAM *et al.*

SAME *v.* SEYMS.

MANHATTAN LIFE INSURANCE COMPANY *v.* BUCK, EXECUTOR.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1876.

[*Reported in 93 United States Reports, 24.*]

THE first of these cases is here on appeal from, and the second and third on writs of errors to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law against the same defendant to recover the amount of a policy issued in 1859 on the life of Henry S. Seyms, the husband of the plaintiff. In this case, also, the premiums had been paid until the breaking out of the war, when, by reason thereof, they ceased to be paid, the plaintiff and her husband being residents of Mississippi. He died in May, 1862.

The third case is a similar action against the Manhattan Life Insurance Company of New York, to recover the amount of a policy issued by it in 1858, on the life of C. L. Buck, of Vicksburg, Miss.; the circumstances being substantially the same as in the other cases.

Each policy is in the usual form of such an instrument, declaring that the company in consideration of a certain specified sum to it in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for

¹ 1 Gray, 282.

² 107 Mass. 514, 517.

the term of his natural life. Each contained various conditions, upon the breach of which it was to be null and void ; and amongst others the following : "That in case the said [assured] shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions ; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

The decree and judgments below were against the defendants.

Mr. *Matt. H. Carpenter* and Mr. *James A. Garfield*, for the appellant in the first case, and for the plaintiff in error in the second. The third case was submitted by Mr. *Alfred Pitman* for the plaintiff in error.

Mr. *Clinton L. Rice*, for the appellees in the first case, and Mr. *Joseph Casey*, for the defendant in error in the second. The third case was submitted by Mr. *W. P. Harris*, for the defendant in error.

Mr. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, — as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid ; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured,

a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, etc. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever

been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and correlated to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the

money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a Northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party,—an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge, that the annual premiums are increased with the age of the person applying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of one thousand dollars, whilst a person at forty-five is charged about thirty-eight dollars. It is evident, therefore, that, when the younger person arrives at forty-five, his policy has become, by reason of his previous payments, of considerable

value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings-bank is said to belong to the person who made the deposit. Indeed, some life-insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it; in other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it, — a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have to be paid on a new policy; or, thirty-eight dollars per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim that no one should be made rich by making another poor.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and the decree in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed, and the records remanded for further proceedings. We perceive that the declarations in the actions at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand; but as the question is one of first impression, in which the parties were necessarily somewhat in

the dark with regard to their precise rights and remedies, we think it fair and just that they should be allowed to amend their pleadings. In the equitable suit, perhaps, the prayer for alternative relief might be sufficient to sustain a proper decree; but, nevertheless, the complainants should be allowed to amend their bill, if they shall be so advised.

In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.

WAITE, C. J. I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

STRONG, J. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums: it merely gives him an option to pay or not, and thus to continue the obligation of the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such a case, the doctrine that accident, inevitable necessity, or the act of God, may excuse performance, has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay

premiums. And so, though for other reasons, the majority of the court holds; but they hold, at the same time, that the assured in each case is entitled to recover the surrender, or what they call the equitable, value of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender; and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

CLIFFORD, J., with whom concurred HUNT, J., dissenting.

Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.

(c.) *Plaintiff relying on the Statute of Frauds.*

THOMAS v. BROWN.

IN THE QUEEN'S BENCH DIVISION, MAY 26, 1876.

[*Reported in Law Reports, 1 Queen's Bench Division, 714.*]

INTERPLEADER ISSUE obtained in an action brought by the plaintiff against Croucher, an auctioneer, to recover a deposit.

The following case was stated for the opinion of the court:—

1. The defendant, previously to the 10th of May, 1875, had advertised a leasehold shop and premises at Hornsey Rise, Middlesex, to be sold by auction by E. E. Croucher, an auctioneer, at the Mart in the city of London, on the 10th of May, 1875, under printed particulars and conditions of sale. Previous to the day of sale the plaintiff was in communication with the auctioneer as to the purchase of the premises, and received from him the particulars and conditions. In the particulars the property was described as “held under a lease dated the 5th of December, 1856, for an unexpired term of 80½ years, and as leased to Mr. Miles, a draper, for the term of 21 years from the 26th of March, 1871.”

The following conditions of sale are material:—

“Sixth. The said lease and the counterpart of the under-lease will be produced at the sale, and may be inspected at the office aforesaid during three days previous to the day of sale, and no objection shall be taken to

any matter contained in or omitted from the same lease or under-lease. The production of the receipt for the rent last due shall be taken as conclusive evidence of the performance of insurance, and all other leases and covenants, in respect of the lot, up to the day of completing the purchase, whether the purchaser shall or shall not have had notice of any breach of any particular covenant, and the purchaser shall not object that any instrument is unstamped, or not sufficiently stamped, or to the non-registration of any deed or document in Middlesex, and no evidence of identity shall be required."

"Ninth. If any mistake be made in the description of the property, or any other error shall appear in the particulars of sale, such mistake or error (if capable of compensation) shall not annul the sale, but a compensation shall be allowed or given by the vendor or purchaser as the case may require; such compensation in case of dispute to be settled by arbitration in the usual way."

"Lastly. If the purchaser shall fail to comply with any of the above conditions, his deposit money shall be forfeited to the vendor, who shall be at liberty (with or without notice) to resell the premises by public auction or private contract, without the necessity of previously tendering an assignment to the defaulter, and such new sale or sales may be made at such time or times, and subject to such conditions and in such manner in all respects, as the vendor shall think proper. And if on or after such resale there shall be any loss to the vendor, either by reason of a deficiency of price, or by reason of costs, charges, or expenses incurred by him, or both, the purchaser shall make good such loss to the vendor, as and for liquidated damages, and on any such resale by auction the premises offered for sale may be bought in, and all expenses of and attending an unsuccessful attempt to sell may immediately thereupon be recovered from the defaulter."

2. On the 10th of May, 1875, the plaintiff did not attend the sale at the mart, but she afterwards signed the following contract, which was partly printed and partly in writing, on the back of one of the printed particulars and conditions of sale:—

Memorandum.

I, the undersigned Hannah Thomas, of 3 Peter's Lane, West Smithfield, do hereby acknowledge that I have this day purchased the property described in the within particulars, subject to the foregoing conditions of sale, at the price of seven hundred pounds, and that I have paid into the hands of the auctioneer the sum of seventy pounds as a deposit and in part payment of the said purchase-money; and I hereby agree with the vendor to pay the remainder of the said purchase-money to complete the purchase according to the within conditions of sale.

As witness my hand the 10th day of May, 1875.

(Signed)

H. THOMAS.

	£	s.	d.
Purchase-money	700	0	0
Deposit-money paid	70	0	0
Remaining to be paid	630	0	0

As agent for the vendor I ratify this sale, and as auctioneer acknowledge the receipt of the deposit.

Witness, A. N. STUTTARD.

EDWD. E. CROUCHER.

3. On or about the 15th of May, 1875, the following letter, and the abstract therein referred to, were received by Messrs. Keen & Rogers, the plaintiff's solicitors :—

Herewith I send abstract of title. The deeds may be examined at my office at any time you may appoint.

JNO. FRASER.

4. In reply Messrs. Keen & Rogers wrote :—

15th May, 1875.

Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next at 2 o'clock to examine abstract of title, with deeds, on behalf of Mrs. Thomas.

5. From the abstract of title, it for the first time appeared that the defendant was the owner of the property the subject-matter of the contract of the 10th of May, 1875. //

6. Messrs. Keen & Rogers, having examined the abstract with the title-deeds, on the 21st of May, 1875, wrote to the defendant's solicitor :—

"We forward you herewith a few requisitions on the title, and shall be glad to receive your replies at your early convenience."

Accompanying, and at the foot of the requisitions above-mentioned, was a note as follows :—

"The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises."

7. On the 22d of May, 1875, the defendant's solicitor wrote to the plaintiff's solicitors, "Herewith I return requisitions with answers."

8. On the 2d of July the defendant's solicitor wrote to the plaintiff's solicitors :—

"Please let me have draft assignment at your early convenience."

And on the 9th of July the defendant's solicitor wrote to the plaintiff's solicitors as follows :—

"BROWN & THOMAS, — I have just been informed by Mr. Croucher that your client does not intend to complete her purchase, please let me know whether my information is correct; if it is I shall immediately instruct counsel to draw bill for specific performance."

9. The plaintiff's solicitors repudiated the contract of the 10th of May, 1875, and on the 23d of July commenced an action against Croucher for the recovery of the 70*l.* which had been paid to him by the plaintiff on the signing of the contract.

10. The defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the above contract, and no question has been raised on the answers to the requisitions, but one of the grounds of the repudiation was that the contract of the 10th of May, 1875, did not disclose the name of the vendor.

The questions for the opinion of the court are, 1. Whether the contract of the 10th of May, 1875, is a valid contract. If the court shall be of opinion in the affirmative, the judgment is to be entered for the defendant. 2. If the court shall be of opinion in the negative, the second question is whether the plaintiff is entitled to recover back the deposit paid under the above circumstances.

Fallarton, Holl with him, for the plaintiff.

J. Thompson, Salter, Q. C., with him, for the defendant.

Cur. adv. vult.

The following judgments were delivered : —

MELLOR, J. This is an interpleader issue to try the plaintiff's right to recover 70*l.* paid by her as a deposit on the purchase of some leasehold property. The facts are stated in a case for the opinion of the court. (The learned judge stated the principal facts, and proceeded.) The two questions for our consideration are, first, whether the contract was a valid contract, and, secondly, if it was not, whether the plaintiff is, under the circumstances, entitled to recover back the deposit. I am of opinion that our judgment ought to be for the defendant. Several cases have been decided on the point now raised, particularly two cases which came before the Master of the Rolls: *Sale v. Lambert*¹ and *Potter v. Duffield*.² In the first of these cases a memorandum of agreement was held to be sufficient within the statute of frauds, though the vendor was not described otherwise than as "the proprietor" of the premises, the Master of the Rolls saying that the term "proprietor" was an excellent description, and apparently holding that this word, with nothing else in the document to enlarge it, was quite sufficient. Now, comparing this decision with the later one, *Potter v. Duffield*,² where the same learned judge held that the description "vendor" was insufficient, I have some difficulty in assenting to it. I think, however, that we ought to hold ourselves bound by the last of these two cases, holding that the word "vendor" is insufficient, though, as far as my judgment goes, I can see no distinction between the nature of the memorandum in either case. I think that the description which should enable us to dispense with the actual names of the parties ought to be very precise and exact, and that in neither of the cases was this requirement com-

¹ L. R. 18 Eq. 1.

² L. R. 18 Eq. 4.

plied with. To allow so general a description to satisfy the statute seems to me to lead to all the mischief which it was intended to prevent, and I think that no description ought to be held sufficient except where it identifies the party without the necessity of resorting to parol evidence. However, it is unnecessary to consider whether these cases were or were not rightly decided, for I think that the defendant is entitled to our judgment on two grounds. The main object of the interpleader issue is to ascertain whether the 70% belongs to one or other of the two parties, and the case in *Beavan's Reports*, *Casson v. Roberts*,¹ where it was held that a contract under similar circumstances could not be enforced, is, I think distinguishable, in spite of some strong expressions of Lord ROMILLY. Here, there are two answers to the claim to have the money paid back to the vendee. First, on the face of these conditions of sale it is obvious that the plaintiff paid the deposit knowing at the time that the name of the defendant did not appear on the memorandum of agreement otherwise than as "the vendor." She voluntarily paid the 70%, with full knowledge that the vendor's name was not disclosed on the contract, and so far accepted the description as sufficient. Under these circumstances, I think she cannot recover back the money.

Secondly, under the fourth condition of sale² "the vendor shall, within seven days from the day of sale, deliver to the purchaser or his solicitor an abstract of title to the property purchased by him, subject to the stipulations contained in the conditions. And the purchaser shall, within seven days from the delivery of the abstract, deliver to the vendor's solicitor a statement in writing of his objections and requisitions (if any) to or on the title as shown by such abstract, and upon the expiration of such last-mentioned time the title shall be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions (if any), and time shall be deemed to be as of the essence of this condition, as well in equity as at law." Now, what did the plaintiff do? If she had intended to insist on her right to rescind the contract on the ground that the memorandum was insufficient, it was her duty to send back the abstract, saying, "Why do you send this to me?" She, however, does not send it back, but keeps it, and her solicitors write this letter: "Dear Sirs, — Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next, at two o'clock, to examine abstract of title with deeds, on behalf of Mrs. Thomas."

Now I cannot conceive anything more unlikely than that a solicitor would allow his client's title-deeds to be examined while there was a doubt as to the validity of the contract of sale. But the plaintiff's solicitors proceeded to examine the abstract, and learn from it the name of the vendor.

¹ 31 Beav. 613; 32 L. J. Ch. 105.

² This condition was not set out in this case, but a copy of the conditions was by consent referred to during the argument.

Then they keep the abstract in their possession, as if the only question which could arise was as to the title, and write a letter inclosing requisitions as to the title, putting at the foot of the requisitions the words, "The above requisitions are made without prejudice to any question that may arise as to the contract for the purchase of the premises." I take the word "objection" to mean any unforeseen objection to the title which the plaintiff's solicitors did not wish to be taken to have waived. The requisitions are returned with answers, the correspondence goes on, and finally, on the 9th of July, the defendant's solicitor writes that he has been informed that the plaintiff does not intend to complete her purchase, and that if this be true he shall take proceedings. To this the plaintiff's solicitors reply repudiating the contract.

Now I feel no doubt that the case comes within the rule laid down in *Cornish v. Abington*,¹ that, "if any person by actual expressions, or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or licence, and acts upon such inference, whether the former intends that he should do so or not, the party using that language or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." I think this is an express authority which quite justifies us in holding that it does not lie in the mouth of the vendee, who has accepted a contract like this, afterwards to object to it. For this reason I think we cannot say that the contract is invalid.

Then there is a second answer. In an action like the present, for money had and received, the plaintiff can only recover money paid without knowledge of the real facts, — in ignorance of facts which, if they had been known, would have left the plaintiff an option whether she would pay or not. The rule is laid down by PATTESON, J., in *Duke of Cadaval v. Collins*,² that money paid under compulsion of law cannot be recovered back as money had and received; and, further, "where there is *bona fides* and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." It is unnecessary to allude to the difference between ignorance of the law and ignorance of the facts. Now, is there anything unconscionable in the defendant keeping this money? I can see nothing. The breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the statute of frauds, and to say, "Although I can have the contract performed if I please, I repudiate it." Under these circumstances, I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim.

QUAIN, J. I am of the same opinion. I do not propose to discuss the cases which have been cited; I will merely say that I have great difficulty

¹ 4 H. & N. 549; 28 L. J. Ex. 262.

² 4 A. & E. 858.

in reconciling the two decisions of the Master of the Rolls. But I decide this cause on the ground that it is an action by an unwilling vendee against a willing vendor, and that it cannot be said that the consideration has failed so as to entitle the plaintiff to recover. By the 10th paragraph of the case it appears that the defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the contract; in short, to give the plaintiff all that was bargained for. Now where, upon a verbal contract for the sale of land, the purchaser pays the deposit and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money. Secondly, we must consider the peculiar position of the parties as disclosed by the correspondence. It appears that after the purchaser received the abstract the solicitors examined it with the deeds and made requisitions. These were acts which assumed that a contract existed, and yet the plaintiff now proposes to take proceedings upon the footing that there was no contract at all. It will, no doubt, be said that everything was done "without prejudice to any question which might arise as to the contract of purchase," and that this reservation having been assented to, the defendant is bound by it. But, in my opinion, the words "without prejudice to any question which may arise" mean any question in the execution of the contract, and not any question as to the existence of the contract. I think that no solicitor would understand the plaintiff as reserving any question as to the existence of the contract. Under such circumstances the plaintiff is not entitled to recover the deposit. With regard to the case of *Casson v. Roberts*,¹ I do not think that it has much bearing upon the present question, but I must say that I do not think the reasons upon which it proceeded are satisfactory.

Judgment for the defendant.

Court

ALFRED PHILBROOK v. WILLIAM BELKNAP.

IN THE SUPREME COURT OF VERMONT, MARCH, 1834.

[*Reported in 6 Vermont Reports, 383.*]

THIS was an action on book account, referred to auditors in the County Court, who found for the defendant, and made the following special report of the facts in the case:—

"The plaintiff produced the following account, to wit:—

William Belknap to Alfred Philbrook

Dr.

831, Oct. 1. To labor $5\frac{1}{2}$ months, commencing 11th April, 1831, and ending about the last day of September following, at \$8.00 per month . . . \$44.00

¹ 31 Beav. 613; 32 L. J. Ch. 105.

"The defendant produced no account. The plaintiff offered himself to testify to his account, to which the defendant objected; he, the defendant, offering to prove that the labor charged was done under a contract by the parties that plaintiff should labor for defendant three years, which was not performed on the part of the plaintiff. The objection was overruled, and the plaintiff sworn and testified in the case. The defendant was also sworn without objection and testified in the case. The plaintiff having testified that he performed the labor, that it was worth the sum charged, and that he had received no pay therefor, rested his case. The defendant then offered to prove that the labor charged was performed under a contract, that plaintiff was to labor for defendant three years, at eight dollars per month, which contract plaintiff had violated, by refusing to labor other than the five and a half months as charged. To this evidence the plaintiff objected that such testimony was irrelevant, and would constitute no defence in law. The objection was overruled and the testimony admitted, the parties having both testified relating to the amount. The defendant and sundry other witnesses having also been examined, the auditor finds the following facts in the case: That in April, 1831, the plaintiff, having had some practice in edge-tools, applied to defendant, who was a master millwright, to hire out to defendant to work with him at the defendant's trade, when it was agreed by the parties that plaintiff should work for defendant at said trade three years, at eight dollars a month, the defendant to instruct the plaintiff in the art or trade of a millwright: but if plaintiff left the defendant before the end of the three years, unless in case of sickness, plaintiff to have nothing for his labor. The plaintiff then, in April, 1831, commenced laboring with defendant, and continued for five months and a half, during which time he was a faithful laborer at the trade, and well earned the defendant the sum charged in plaintiff's account, the defendant having the whole of said time received in goods out of different stores one dollar per day and board for the plaintiff's services, for which the plaintiff had received no pay; that defendant, during said time, boarded and properly instructed the plaintiff in said trade: that at the end of said five and a half months, plaintiff gave notice to defendant, that unless his wages were raised to one hundred and twenty dollars per year, he should quit, which being refused by defendant, plaintiff did quit, against the will of the defendant, said employment and town, without any reasonable cause, and has never since returned or offered to return to defendant's employment; that said contract between the parties was verbal and never reduced to writing. Whereupon, the auditor, after offering the parties to refer the law arising upon the facts to the court (which they declined), reports that there is nothing due from either party to balance book accounts, (the auditor having disallowed the only item in the case), whereupon finds for the defendant his cost."

The County Court reversed this decision of the auditor, and gave judg-

ment for the plaintiff. To this the defendant excepted, whereupon the cause passed to this court for further adjudication.

Smith and Peck for the plaintiff.

The opinion of the court was pronounced by

PHILIPS, J. This case comes before us upon a special report of the auditor. It seems that the auditor, upon the facts stated in his report, found for the defendant; the County Court reversed that decision, and gave judgment for the plaintiff. To this the defendant excepted, and the question now is, which of the parties, upon the facts found, is entitled to judgment. An exception is taken to the form of the action which we do not think well founded. If the plaintiff be entitled to recover at all, the claim becomes a mere claim for services at a fixed monthly compensation, and an ordinary subject of book charge, and of recovery in this form of action. The objection that the special contract precludes a recovery, depends upon the terms and effect of that contract, and goes to the merits, rather than the form of the action. The effect of the contract upon this question depends upon the inquiry whether the performance of the labor is a condition precedent to the right of recovery, or, on the other hand, whether the promises are independent.

The subject of dependent and independent covenants, or promises, is much perplexed, and so much ingenuity and learning have been expended upon it, that, like some other branches of the law, it seems to be involved in a sort of artificial embarrassment. If, in this case, the plaintiff had stipulated for a gross sum, to be paid at the expiration of his service, the performance of the labor would doubtless be regarded as a condition precedent. But as the compensation was at a certain rate per month, if it should appear that payment was to be made as fast as it was earned, the case would be different. The auditor does not report when the wages were to be paid; but fortunately there is a fact stated in the report, which relieves us from all difficulty on the subject. It is clearly competent for the parties to make their undertakings dependent, or independent, as they deem expedient; and where their intent is ascertained, it is decisive of the question. In this case, the stipulation that the plaintiff should have nothing for his services, if he left the service of the defendant before the expiration of the three years, makes the performance of the whole service a condition precedent; and if that part of the contract be binding upon him, he cannot recover.

It is argued, however, that the contract is void, by force of the statute of frauds. Admitting that this contract is within the terms of the statute, yet it may be well to inquire, what is the effect of the statute upon it. Although it is common to speak of a contract as void by the statute of frauds, yet, strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it. The statute provides that no action shall be sustained upon certain contracts, unless they are evidenced by writing. It operates, therefore, upon the con-

tract only while it is executory. It does not make the performance of such a contract unlawful, but, if the parties choose to perform it, the contract remains in full force, notwithstanding the statute, so far as relates to the legal effect and consequences of what has been done under it. Hence a party may always defend under such a contract, when sued for any act done under it. Thus, suppose a crop of grass is sold by parol, and the vendee enters upon the land and cuts it. If an action of trespass should be brought against him, by the vendor, upon the ground that the contract was void, still, although the contract is within the statute, it would furnish a sufficient defence, because it is executed. This very case affords an illustration of the effect of the statute. If the defendant had sued the plaintiff for not performing the contract, in not serving the full period, the case would be open to a defence under that statute; the contract being, to the purposes of such a suit, executory, and the attempt being to sustain an action on it as such. But in this case, the contract, so far as the service has been performed, is executed, and is relied on as regulating and determining the right of the plaintiff to compensation for what has been done under it. We are here concerned only with what has been done. The question is, what the plaintiff is entitled to for his labor; and this depends upon the terms of the contract under which he performed the service. Had the whole service been performed, the rate of compensation would, without doubt, be regulated by the terms of the contract. No court would discard that contract, and resort to a *quantum meruit*. The principle is the same as to a performance in part. The defendant may be without remedy for the desertion of the plaintiff, but he may certainly protect himself as to what has been done.

Any other rule would be productive of monstrous injustice, and make the statute an instrument of fraud. It is on this ground that courts of equity will enforce a contract of such a nature, which is partly performed, where the party cannot be made good without a full performance. The statute was merely intended to prevent frauds by setting up and enforcing, by parol proof, simulated contracts, and hence is called the statute of frauds and perjuries. It was not intended to vary or control contracts which the parties have voluntarily carried into effect; nor to deprive parties of the protection of such stipulations as they may have made for their security, and in reliance upon which they have acted.

This construction is the only safe one that can be given to the statute, and it is the only one which has ever been given to it. Suppose a party enters into possession, under a parol lease for years; was it ever imagined that he could be made liable as a trespasser? Suppose a promise to pay the debt of another, and the debt actually paid. Was it ever attempted to recover back the money by force of the statute?

We are the more satisfied with this view of the subject, as we are persuaded that full justice will be done by it. The plaintiff is doubtless

amply compensated for the loss of the stipulated wages by the instruction received and the enhanced wages which he may obtain elsewhere in consequence; and the defendant gains nothing, as he loses the services of the plaintiff when they become more valuable.

It only remains to add that this case falls most clearly within the decision of *Hair v. Bell*.¹

Judgment reversed, and judgment for the defendant.

Court

COLLIER v. COATES.

IN THE SUPREME COURT OF NEW YORK, MARCH 6, 1854.

[*Reported in 17 Barbour, 471.*]

THIS was an appeal from a judgment of the Steuben County Court. The action was commenced before a justice of the peace, to recover back the sum of \$65 which had been paid by the plaintiff upon a parol contract for the sale of a farm by the defendant to the plaintiff. The complaint was for money lent, and money paid. The defendant denied the allegations in the complaint, and stated that if he had received any money from the plaintiff it was upon the condition that the defendant would enter into a written agreement with the plaintiff, at a future day, which the defendant alleged he was, and at all times had been, ready to do, and he further averred that he had suffered great damage and expense by reason of the plaintiff not performing his agreement. A parol agreement between the parties, for the sale of the defendant's farm to the plaintiff, was proved, and the price was agreed upon. The plaintiff paid to the defendant \$65 upon the contract, and was to pay, within a week or ten days, enough more to make \$200; and then a written contract was to be executed by the parties. Subsequently the plaintiff came back and told the defendant he could not make out the \$200, and therefore could not take the farm, and he sent word to the defendant, by his son, that he, the defendant, might have the \$65 the plaintiff had paid him for his damages, or he might pay back some part of it if he could afford to. The jury found a verdict in favor of the plaintiff for \$65, and the justice rendered judgment for that sum, with costs. On appeal the County Court affirmed the judgment.

R. B. Van Valkenburgh for the appellant.

Campbell and Rogers for the respondent.

By the Court. — JONXSON, J. I regard the rule as well settled, in this country, at least, that where a person has paid money upon a parol contract for the purchase of lands, which is void by the statute of frauds, he

¹ 6 Vt. 35.

cannot maintain an action to recover back the money so paid, so long as the other party to whom the money has been paid is willing to perform on his part.

The doctrine has been twice distinctly declared in our own court, where the question was directly before it. *Abbott v. Draper*; ¹ *Dowdle v. Camp*.² The same question has been decided in the same way repeatedly in several of the courts of our sister States, where the point was directly involved. *Coughlin v. Knowles*; ³ *Thompson v. Gould*; ⁴ *Duncan v. Baird*; ⁵ *Lane v. Shackford*; ⁶ *Shaw v. Shaw*; ⁷ *Richards v. Allen*; ⁸ *Sims v. Hutchins*; ⁹ *Beaman v. Buck*; ¹⁰ *McGowen v. West*; ¹¹ *Rhodes' Adm'r v. Stow*; ¹² *Dougherty v. Goggin*.¹³ In several of the cases above cited, the facts are almost identical with those of the case at bar. All the cases agree that if the party receiving the money refuses to perform the agreement, such as it is, on his part, the action lies.

I doubt whether any well considered case can be found in the courts of this country, where the rule above laid down has been denied or even doubted. *Rice v. Peet* ¹⁴ is cited as holding a contrary doctrine, but it does not. That case turned upon the insanity of the plaintiff at the time of making the trade and turning out the note, which fact the court considered as established by the verdict of the jury. The court do indeed say that the plaintiff might have recovered upon the ground that the contract for the exchange of farms, on which the money was received, being by parol, was void. But the decision was evidently not placed upon that ground. And besides, although the defendant in that case alleged in his plea that the plaintiff had failed in performing his agreement, no evidence seems to have been given upon the subject, and there is nothing in the case to show who was, in fact, in fault in not carrying out the agreement to exchange farms. The decision upon the point presented by the finding of the jury does not impugn the principle contended for, and at most can only be regarded as a *dictum* the other way. But it is contended by the learned and ingenious counsel for the plaintiff that neither *Dowdle v. Camp* nor *Abbott v. Draper* are authorities against the plaintiff's right to recover, because in each of those cases the plaintiff was in possession of the premises purchased, and might have enforced a specific performance of the agreement in a court of equity. In that respect, it is true, the two cases above cited differ from the case here, although several of the other cases cited do not. But I am unable to perceive how that circumstance affects the principle upon which the plaintiff claims the right to recover. The foundation of his claim is that the money was paid without consideration. That is, that having been

¹ 4 Denio, 51.

² 12 Johns. 451.

³ 7 Met. 57.

⁴ 20 Pick. 132, 142.

⁵ 8 Dana, 101.

⁶ 5 N. H. 133.

⁷ 6 Vt. 75.

⁸ 5 Shep. 296.

⁹ 8 S. & M. 328.

¹⁰ 9 S. & M. 257.

¹¹ 7 Miss. 569.

¹² 7 Al. 316.

¹³ 1 J. J. Marsh. 374; 2 J. J. Marsh. 563.

¹⁴ 15 Johns. 503.

paid upon a promise made by the defendant which the law would not compel him to perform, nor mulct him in damages for refusing to perform, and which was, in short, void by statute, it was paid without any consideration whatever which the law notices or regards. But this condition of the parties is not in the least altered by the purchaser's going into possession, so far as the validity and force of the agreement is concerned. It is still void by the statute of frauds, notwithstanding the possession. Nothing is better settled than this, that part performance of a parol contract void by statute does not take it out of the statute, or give it any validity in law as a contract.

To whatever extent either or both of the parties may have gone in the performance of such a contract, it still remains of no legal or binding force in law, in every stage up to its full and final performance and execution by both. If it is conceded that possession by the plaintiff, in addition to the payment, would have operated to defeat the recovery of the money paid, the whole ground of controversy is surrendered. It could make no difference as regards the right of action, so far as the question of consideration is concerned, whether the defendant had in fact performed in part or whether he was willing and offered to perform. Besides, when the other party is willing and offers to perform, the question as to whether the plaintiff could compel him to do so in case of his refusal, does not arise. It is clear enough that in case of a refusal the action lies, and the refusal is the ground upon which the action for the recovery is based. Certainly a willingness or an offer to perform must be regarded as placing the defendant in as favorable a situation as part performance, as regards the action at law.

Courts of equity, in decreeing the specific performance of such contracts, do not proceed upon the ground that the contract has any force or validity in law, but only that it is binding in conscience, and its performance specifically is decreed, expressly to prevent fraud, and for the very reason that in law it is of no force. What courts of equity might do, or refuse to do, can have no bearing upon the legal effect of such a contract. The last act or payment by either party, or both, short of full performance, is as much without consideration in law as the first. If the rules of equity are to be permitted to affect the legal right of recovery, the defendant may safely invoke them in his behalf in the present case. But they are not; and in determining the question here, in the action at law, they may as well be laid entirely out of view. It is by no means a universal rule that money paid, without a consideration good in law, may be recovered back. There are several exceptions to it. And I take this to be one which is well established by numerous adjudications.

The contract here upon which the money was paid, although it was so far void that the law would lend no aid in enforcing it, was not contrary to law. It was neither immoral nor illegal. It was one which the parties had

a right to make and carry out. There was no fraud or mistake of facts. The money was voluntarily paid by the plaintiff, upon a promise made by the defendant, which the former knew at the time he could not oblige the latter to perform, but which promise, nevertheless, he agreed to accept as a sufficient consideration for the money parted with. The money was not received by the defendant as a loan, but as a payment. It was not received to the plaintiff's use. And as long as the defendant is willing to do what he agreed to do, in consideration of the payment, the law will not presume any promise to repay it, but will leave the parties to stand where they voluntarily placed themselves by their arrangement, until the defendant refuses to carry it out. Cases of great hardship are suggested as a reason for the adoption of the rule contended for by the plaintiff's counsel. One of which is, that otherwise the purchaser under such a contract might go on making payments until the last; and although satisfied his bargain is not an advantageous one, yet bound to make his payments or lose what he has paid, while the other party all this time is at perfect liberty to repudiate the arrangement, and may do so at the last moment, to the serious injury of the purchaser. And it is asked if it is right to give one party such an advantage over the other? It would be easy to suggest cases of hardship on the other side, if the right to recover in any case were to be controlled by any such considerations. Take the case at bar, for an example. The evidence shows that when the plaintiff entered into the arrangement with the defendant and made the payment, the latter was engaged in putting in a crop of wheat; that the plaintiff requested the defendant to suspend operations, as he would want to put the land to some other use, and that the defendant did suspend, and waited, expecting the plaintiff to fulfil his engagement, until it was too late to put in his crop; in consequence of which he was injured to the amount of over \$100.

But suppose the whole purchase price had been paid, and the defendant, in the confident expectation of the plaintiff's acceptance of the title, had gone and purchased another farm with the money, and involved himself in liabilities which would be utterly ruinous should the other party be allowed to repudiate and recover back the money. It may be asked, would it be right to allow him to do so? It is sufficiently obvious, however, that neither the plaintiff's right to recover back the money, nor the defendant's right to retain it, can rest in, or derive any aid from, such considerations as these. The principle which governs is more fixed and stable. It is clear that, by the rules of equity, the plaintiff could not recover until he had first made the defendant whole for the damage he had occasioned by the breach of his engagement, or offered to do so. And the law will not, I think, aid the party thus in the wrong, by presuming a promise of repayment, in his favor, until the other party shall refuse to go on and carry out the agreement upon which the money was paid. The rule which I suppose to be established seems to me to be one founded in reason and good sense,

which ought to be upheld. And I regard it as being too well settled upon authority to be departed from, except upon the most cogent reasons, and from the clearest convictions of its unsoundness. I am of opinion, therefore, that the judgment of the County Court and that of the justice should be reversed.

CHARLES P. KING v. ABNER P. WELCOME.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1855.

[Reported in 5 Gray, 41.]

ACTION of contract on a quantum meruit, for work and labor done by the plaintiff for the defendant. Trial in the Court of Common Pleas. The defence relied on was that the work and labor were done under an entire contract for one year, and that the plaintiff wrongfully left the defendant's service before the year expired. It appeared that the contract was not in writing, and bound the plaintiff to labor for one year, to commence at a future day, two or three days after the making of the contract. The plaintiff contended that it was invalid, as being within the statute of frauds, and could not be set up in defence of this action. BYINGTON, J., so ruled, and directed a verdict for the plaintiff, and the defendant alleged exceptions.

B. Sanford for the defendant.

E. H. Bennett for the plaintiff.

The decision was made in June, 1857.

THOMAS, J. This was an action of contract on a quantum meruit, for labor done by the plaintiff for the defendant. The amount and value of the plaintiff's services were not disputed, but the defendant relied upon an express contract by which the plaintiff was to work for an entire year, and a breach of such contract by wrongfully leaving the plaintiff's service before the year expired. That contract was not in writing. By its terms, the plaintiff was to labor for one year from a day future. The plaintiff said that contract was within the statute of frauds, and could not be set up in defence to the action. So the court ruled.

Rightly, we think; though, in the light of the authorities, the question is a nice and difficult one.

Upon the reason of the thing, and looking at the object and purpose of the statute, the result is clear. So far as it concerns the prevention of fraud and perjury, the same objection lies to the parol contract, whether used for the support of, or in defence to an action. The gist of the matter is, that, in a court of law, and upon important interests, the party shall not avail himself of a contract resting in words only, as to which the

memories of men are so imperfect, and the temptations to fraud and perjury so great.

The language of our statute is, that "no action shall be brought upon any agreement that is not to be performed within one year from the making thereof, . . . unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."¹

Looking at the mere letter of the statute, the suggestion is obvious, that no action is brought upon this contract. But the defendant seeks to "charge the plaintiff therewith," to establish it by proof, to enforce it in a court of law, and to avail himself of its provisions. And if the defence succeeds, the plaintiff is in effect charged with and made to suffer for the breach of a contract which he could not enforce, and which could not be enforced against him.

The difference, it is clear, is not one of principle. To illustrate this, let us suppose that in the contract, which the defendant seeks to set up in defence, there had been a provision for the payment of the wages stipulated, by semi-annual instalments. If, upon the expiration of the six months, the plaintiff had brought an action upon the contract to recover the instalment, the action could not be maintained; the statute of frauds would be a perfect defence. This is settled in the recent case of *Hill v. Hooper*.² But if in an action brought for money lent or goods furnished to himself or family, he may avail himself of the instalment, by way of set-off or payment; the difference is merely one of form, and not of substance.

Still further, upon the construction of the statute contended for by the defendant, the laborer in the contract stated would be without remedy. For if he brought his action upon the contract for the instalment, the statute of frauds would be a bar; if upon a *quantum meruit*, the express contract to labor for a year would be a bar.

The sounder construction of the statute, we think, is that a contract within its provisions is one which neither party can enforce in a court of law. *Carrington v. Roots*; ³ *Reade v. Lamb*; ⁴ *Comes v. Lamson*.⁵ The cases in the exchequer go farther than is necessary to sustain the rule stated. They hold the contract, as a contract, is void, because it is a contract of which a party cannot avail himself in a court of law. Upon this point the recent case of *Leroux v. Brown*⁶ is in conflict with them.

This court has not treated the contracts as absolutely void. When fully executed, they define and measure the rights of the parties thereto. And if this contract had been fully executed, and the plaintiff had earned the price stipulated, and had then brought *quantum meruit* on the ground that

¹ Rev. Sts. c. 74, § 1, cl. 5.

² 1 Gray, 131.

³ 2 M. & W. 248.

⁴ 6 Ex. 130.

⁵ 16 Conn. 246.

⁶ 12 C. B. 801.

his services were reasonably worth more, the contract so executed would have been a full answer. *Stone v. Dennison*.¹ But this contract was not performed; it was, to a great extent, executory. For breach of it by the defendant, no action could be maintained by the plaintiff. Nor, by parity of reason, can the plaintiff's breach of it be set up to defeat his reasonable claim for services rendered.

But though a contract within the statute of frauds, as a contract, cannot be enforced in a court of law, it may be available for some purposes.

A parol contract for the sale of land, though not enforceable as a contract, may operate as a license to enter upon the land, and, until revoked, be a good answer to an action of trespass by the owner.

So where money has been paid upon a parol contract for the sale of land, it cannot be recovered back, if the vendor is willing to fulfil the contract, on his part. This is settled in the recent case of *Coughlin v. Kuowles*,² a case which certainly resembles the one at bar, but which may be clearly distinguished from it.³ That action rests upon an implied assumpsit. The implied promise arises only upon the failure of the consideration upon which the money was paid. The plaintiff fails to show any failure of consideration. He shows the money was paid upon a contract not void, and which the defendant is ready to perform. The consideration upon which it was paid exists unimpaired. If the defendant had refused to convey, or if, as in the case of *Thompson v. Gould*,⁴ the property had been destroyed by fire, so that the contract could not be performed by the vendor, there would be a failure of consideration, from which an implied promise would arise, and the action could be maintained.

In the case at bar, the plaintiff shows services rendered for the defendant, and their reasonable value. The defendant, admitting the performance of the labor and its value, says the plaintiff ought not to recover, because he made an entire contract for a year, which he has not fulfilled. The plaintiff replies, that contract was for work for a year from a day future; it was within the statute of frauds; it was not in writing; it was not executed, and cannot be used in a court of law, either as the basis of an action, or to defeat a claim otherwise just and reasonable.

In the case of the money paid upon a contract for the sale of land, the action fails because no failure is shown of the consideration from which the implied promise springs.

In the case at bar, the defence fails because the contract upon which the defendant relies is not evidenced as the statute requires for its veri-

¹ 13 Pick. 1.

² 7 Met. 57.

³ In *Riley v. Williams*, 123 Mass. 506, it was held that a plaintiff who had performed a contract not enforceable because of the Statute of Frauds, could not recover on a *quantum meruit*, the defendant being ready and willing to pay in land and labor according to the terms of the contract. — Ed.

⁴ 20 Pick. 134.

ation and enforcement. For it is the whole contract of which the defendant seeks to avail himself. His defence is not that as to so much as is executed, as to so much time as the plaintiff has labored, he labored under the contract, and the price stipulated is 'to govern. But he relies upon the contract, not only so far as it is executed, but so far as it is still executory. He seeks first to establish the parol agreement as a valid subsisting contract, and then to charge the plaintiff with a breach of it.

A construction of the statute which would sanction this use of the contract, would lose sight of the obvious purposes of the statute. It would adhere to the letter at the expense of the spirit. It would operate unequally upon the parties. The weight of authority is against it.

Exceptions overruled.¹

W. C. C. T.

HOSKINS v. MITCHESON.

IN THE QUEEN'S BENCH OF UPPER CANADA, MICHAELMAS TERM, 1857.

[*Reported in 14 Upper Canada Queen's Bench Reports, 551.*]

ASSUMPSIT on the common counts.

Pleas: *non-assumpsit*, and payment.

At the trial, at Perth, before HAGARTY, J., the plaintiff failed as to part of his demand at the trial, on the ground that the goods for which he claimed were sold not on his sole account, but were goods of himself and his partner Lackie, and were sold on account of the firm. There was another item of charge, £19 5s. 1d., for which it appeared the plaintiff might have sued alone, being goods of his own got by the defendant; but as to that, the defence was this: The defendant had verbally agreed to sell to the plaintiff three village lots for £100, payable in annual instalments of £20 each, with interest, and the goods in question were taken by the defendant as so much cash paid on account of the lots, and the plaintiff had upon that footing been given a receipt for that part of the amount as paid by defendant. The defendant afterwards desired to get back one of the lots, and wished the plaintiff to give up the purchase as to that, but the plaintiff declined: and the defendant, who was called by the plaintiff as a witness upon the trial, swore that he was willing to stand to his bargain, and that the three lots were still ready for the plaintiff.

The plaintiff's counsel objected, that the bargain for the sale of the lots being void for want of a memorandum in writing, the plaintiff was at liberty to sue for the price of his goods as if sold to be paid for in money.

The learned judge held otherwise, but reserved leave to move to enter a

¹ *Freeman v. Foss*, 145 Mass. 361, *accord.* — ED.

verdict for plaintiff for the £19 5s. 1d. if this court should be of opinion with the plaintiff.

Freeland obtained a rule *nisi* accordingly.

Richards showed cause.

ROBINSON, C. J., delivered the judgment of the court.

The ruling of the learned judge was correct, we think. The goods were to be paid for by crediting them on account of the plaintiff's purchase of the lots, and therefore no implied assumpsit arose to pay for them in money. It is quite true that the plaintiff seems to hold no valid contract from the defendant to convey him these lots, — nothing that he can enforce; but that is his own neglect. He has chosen to trust to the defendant's word, and we have no reason to apprehend that the defendant has violated it or that he will do so; on the contrary, he fully admitted on the trial his engagement to sell the lots at the price agreed upon, and avowed his readiness to do so. His having expressed a wish to keep one of them, making of course, a suitable abatement in the sum to be received for the whole, was no proof that he repudiated the bargain. When he found the plaintiff unwilling to give up the lot, he pressed it no further.

If the plaintiff had called upon the defendant to execute an agreement, and he had declined, or had tendered the balance of purchase-money and applied in vain for a deed, he might no doubt have sued for the value of his goods in money, but he has no right to assume that the defendant will disregard the verbal agreement, because it is not binding in law, and without putting him to the proof treat him as if he had done so.

Rule discharged.

Currit

WILLIAM H. GALVIN, RESPONDENT, v. JAMES H. PRENTICE,
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 21, 1871.

[*Reported in 45 New York Reports, 162.*]

APPEAL from the judgment of the General Term of the Supreme Court of the second district, affirming a judgment of the City Court of Brooklyn for the plaintiff.

The action was by an amendment of the complaint, permitted by the court, changed from one on special contract to one on *quantum meruit* for the balance due for plaintiff's service for two years.

It appeared that the plaintiff was verbally hired by the defendant, in May, 1866, to work in the latter's hat factory for the term of three years, upon the following terms: He was to have five dollars a week until he had learned to finish hats properly, and then was to have journeyman's wages.

Two dollars a week were to be deducted from his wages for instruction, damage to material, and use of bench, called "task" money, and fifty cents a week deducted, called "security" money, to be returned to him at the end of the three years, but to be retained, if he left before the end of the three years or was discharged for good cause.

The plaintiff worked from May, 1866, to April, 1868, and then stopped. The evidence was conflicting as to whether or not he was discharged. The deduction of two dollars and fifty cents a week from his wages had been made pretty regularly; and it was for the aggregate of these deductions the action was brought.

The judge charged the jury that, in his view, the discharge had nothing to do with the case; that "it was a void contract, a contract which could not be enforced, which either party had a right to rescind at any time, and therefore it is a mere matter of how much the services are worth. I would state, that whatever amount the jury find they are worth the plaintiff is entitled to. The contract, although void, may be considered *prima facie* evidence of the value of the services."

The defendant excepted to that portion of the charge that the contract might be considered *prima facie* evidence of the value of the services.

William P. Prentice for the appellant.

John F. Baker for the respondent.

RAPALLO, J. That part of the charge of the judge, in which he instructed the jury, that the contract, although void, might be considered *prima facie* evidence of the value of the services, was, under the circumstances of this case, erroneous; and the exception thereto was well taken.

The contract price of the services was fixed with reference to a continuous service of three years. It appeared, upon the plaintiff's own showing, that the contract was that he should work for three years, and be paid the portion of his wages now in question, only in case he served three years, or was discharged for want of work.

The plaintiff claimed that he had been discharged, but the evidence on that point was conflicting, and the judge charged the jury that the discharge had nothing to do with the case. It cannot be assumed, therefore, that the fact of discharge was established.

It appeared that the plaintiff was to learn the business in which he was employed. It cannot be supposed that his work was of the same value during the prior part of the term of his employment, as it would be during the latter part, when his proficiency must naturally have increased. The price agreed upon for the three years was not, therefore, competent evidence of the value of the services during the first and second years, and the contract, being void by the statute, could not be so far enforced as to determine the rate of compensation.

The exception to the ruling on that point is fatal to the judgment. But

it must not be inferred that we agree to the proposition, that if there had been a correct ruling on the question of damages, the plaintiff would have been entitled to recover without proving that he was discharged, or that the defendant was in default.

Where payments are made, or services rendered upon a contract void by the statute of frauds, and the party receiving the services or payments refuses to go on and complete the performance of the contract, the other party may recover back the amount of such payments or the value of the services, in an action upon an implied assumpsit.

But to entitle him to maintain such action he must show that the defendant is in default. *King v. Brown*.¹ The rule is very clearly stated in *Lockwood v. Barnes*,² as follows: "A party who refuses to go on with an agreement void by the statute of frauds, after having derived a benefit from a part performance, must pay for what he has received."

So in *Dowdle v. Camp*,³ *Abbott v. Draper*,⁴ and *Collier v. Coates*,⁵ it was held that money paid on a parol contract for the purchase of lands, which is void by the statute of frauds, cannot be recovered back unless the vendor refuses to perform; and to the same effect are numerous decisions of the courts of our sister States, referred to in *Collier v. Coates*.

The default of the defendant or his refusal to go on with the contract is recognized as an essential condition of the right to recover for services rendered or money paid, under any description of contract void by the statute of frauds. *Erben v. Lorillard*; ⁶ *Burlingame v. Burlingame*; ⁷ *Kidder v. Hunt*; ⁸ *Thompson v. Gould*.⁹

When the contract is entire, and one party is willing to complete the performance, and is not in default, no promise can be implied on his part to compensate the other party for a part performance.

The express promise appearing upon the plaintiff's own showing, although it cannot be enforced by reason of the statute, excludes any implied promise. *Whitney v. Sullivan*; ¹⁰ *Jennings v. Camp*.¹¹ *Expressum facit cessare tacitum*. *Merrill v. Frame*; ¹² *Allen v. Ford*.¹³

The effect of the statute is to prevent either party from enforcing performance of the verbal contract against the other, but not to make a different contract between them.

An implied promise to pay for part performance can arise only when the party sought to be charged has had the benefit of the part performance, and has himself refused to proceed, or otherwise prevented or waived full performance: *Munro v. Butt*; ¹⁴ *Smith v. Brady*; ¹⁵ 13 Johns. 94; 8 Cow. 63; or where, after the making of the contract, full performance has been

¹ 2 Hill, 487.² 3 Hill, 128.³ 12 Johns. 451.⁴ 4 Denio, 51, 53.⁵ 17 Barb. 471.⁶ 19 N. Y. 302 and 304.⁷ 7 Cow. 92.⁸ 1 Pick. 328.⁹ 20 Pick. 134, 142.¹⁰ 7 Mass. 109.¹¹ 13 Johns. 96.¹² 4 Taunt. 329.¹³ 19 Pick. 217.¹⁴ 8 Ell. & Bl. 738.¹⁵ 17 N. Y. 173.

rendered impossible, by death or otherwise, without fault of the contracting party. *Wolfe v. Howes*.¹

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

PECKHAM and FOLGER, JJ., concurred; GROVER, J., concurred in the result on the ground of error in the charge; C. J. did not vote; ALLEN, J., dissented.

¹ 20 N. Y. 197.

CHAPTER III.

BENEFITS CONFERRED WITHOUT REQUEST.

SECTION I.

INTENTIONALLY.

STOKES AND ANOTHER, OVERSEERS OF ST. VEDAST'S, OTHERWISE FOSTER,
v. LEWIS AND ANOTHER, OVERSEERS OF ST. MICHAEL LE QUERN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1785.

[*Reported in 1 Term Reports, 20.*]

THIS was an action for money paid, laid out, and expended, by the plaintiffs to the use of the defendants.

The question arose upon the payment of a sexton's salary. At the trial, which came on before Lord MANSFIELD at the last sittings in London, it appeared that by the act 22 and 23 Car. 2. c. 11, which was an additional act for rebuilding the city of London after the great fire, and uniting parishes, etc., amongst others the parishes of St. Vedast's and St. Michael le Quern were united; and that since that time one set of officers had served for the two parishes, the election of whom had always been made at a joint vestry. That only nine vacancies in the office of sexton had happened since, all of which had been filled up agreeably to this custom. That in the year 1759, the sexton's salary was fixed at 20*l.* per annum, which was agreed to be paid equally by both parishes. That the overseers of St. Vedast's had paid the sexton who was last chosen the whole sum; to recover a moiety of which this action was brought.

The defence set up was, that the last election of a sexton was not a joint one; and that the parish of St. Michael claimed a right of choosing a separate sexton for themselves, of which they had given notice to the other parish.

Lord MANSFIELD, at the trial, being of opinion that this action did not lie, nonsuited the plaintiffs.

Erskine, Mingay, and Law, showed cause against a motion which Sir *Thomas Davenport* had made for a new trial.

One of the first principles of law is, that an assumpsit cannot be raised by paying the debt of another against his will. The present plaintiffs have here paid this money in their own wrong, after notice from the other parish

that they meant to dispute the right, and to elect a sexton of their own. If any party was aggrieved here it was the sexton, and he might have brought his action against the parish who refused to pay their quota.

Sir *Thomas Davenport*, *Beauregard*, and *Chambre*, in support of the rule, said that they had offered to give evidence that a joint vestry did meet on the 17th February, 1784, when the sexton was chosen, after the notice on the 11th that the other parish would not meet. Therefore, although there was notice that they would not meet, yet if they did actually meet, the court would not consider now whether the meeting was perfectly formal and regular; that was a proper circumstance for the jury to decide. If there is a joint obligation to pay a debt, one party may pay the whole, and bring an action for the moiety, even with the dissent of the other party. Whether this was a joint obligation should also have been left to the jury.

Lord MANSFIELD, C. J. All the argument is beside the question. The merits of this election are not material here, and the validity of the meeting on the 17th is not to the purpose. The facts that gave rise to the question are not disputed: the dispute arises concerning the election of a sexton, and the way of trying it is by refusing to pay the sexton elected; the whole is notoriously in litigation. Under these circumstances, therefore, one parish paid the quota of the other in spite of their teeth; then can it be said, that this action for money paid, laid out, and expended, will lie? Certainly not. This action must be grounded either on an express or implied consent: here is neither. Another strong objection to this action is, that it is trying the right of the sexton without his being a party to it.

WILLES, and ASHHURST, Justices, concurred.

BULLER, J. If this were held to be a joint obligation, it would be saying that the sexton might bring his action against one of the parishes for the whole sum: which is not the case.

Rule discharged.

JENKINS v. TUCKER.

IN THE COMMON PLEAS, NOVEMBER 28, 1788.

[*Reported in 1 Henry Blackstone, 90.*]

THE defendant married the plaintiff's daughter; and some time after the marriage went to Jamaica, leaving her and an infant child in England. During his absence she died; and this action was brought by her father against the husband, to recover the money which he had expended after her death in discharging debts which she had contracted while her husband was in Jamaica (by living with her child in a manner suitable to her husband's fortune), and in defraying the expenses of her funeral, which were

also proportioned to the husband's fortune and station. The declaration was in the usual form, for necessaries and funeral expenses, with the common money counts. The defendant paid 100*l.* into court, and pleaded *non assumpsit* as to the residue.

At the trial, the evidence on the part of the plaintiff proved that the defendant was possessed of a large estate in Jamaica; that he lived with his wife till he went thither; that he left her in bad health, and much in want of money; that after her death the plaintiff paid the debts which she had incurred in the absence of the defendant, and her funeral expenses.

To this evidence the counsel for the defendant demurred.

In support of the demurrer, *Runnington*, Serjt., now contended, that a sufficient consideration was not disclosed by the evidence to raise an *assumpsit*. A consideration, on which the law will imply an undertaking, must be either beneficial to the defendant, or detrimental to the plaintiff;¹ but in the present case there was neither one nor the other: the plaintiff paid the money in question without either the knowledge or consent of the defendant, and therefore without his special instance and request. Request is a matter of proof on record.² It is necessary to be alleged. *Hunt v. Bate*.³ Payment of money for another without his consent and against his will is no ground for an *assumpsit*.⁴ If such an action were allowed, it would occasion a manifest injury to the defendant, as he would be precluded from contesting the legality of the original demand, and from the advantage of a set-off.

Generally speaking, *assumpsit* will not lie, except where debt will. Here debt could not be brought, there being neither privity nor a contract between the parties; *Hardr.* 485, where the CHIEF BARON said, that if there be a mere collateral engagement, debt would not lie. This was a collateral obligation, that could not be supported without a special request being proved. If it were otherwise, the greatest inconveniencies would arise. In the present instance the husband would be liable for the debts of the wife beyond what were for necessaries. Though in some particuar cases the law will raise an *assumpsit* where a man is under an obligation of conscience or equity to pay the sum demanded, yet in this case the defendant was neither bound in conscience nor equity to repay money laid out on his account without either his consent, knowledge, or request.

Rooke, Serjt., *contra*. The court will not presume that the money in question was paid without the consent of the defendant because it does not appear to have been paid expressly at his request. It is possible that a previous consent might have been given. This was a matter for the discretion of the jury, who would have determined by a verdict whether there was a sufficient consideration. The rule, that such a consideration as will raise an *assumpsit* must be either beneficial to the defendant or detrimental

¹ 1 Roll. Abr. 24.

² 3 Lev. 366.

³ Dyer, 272.

⁴ 1 Roll. Abr. 11; *Hob.* 105; *Term Rep.* B. R. 20.

to the plaintiff, has been often holden to be too narrow. *Hawkes v. Saunders*.¹ But allowing this rule to be in full force, this case comes within the meaning of it, for it was a benefit to the defendant to have his father-in-law his sole creditor, in the room of many others; and it was also a detriment to the plaintiff to have advanced so much money.

This was not the interference of a stranger, but of a father, whom common decency required to relieve the distresses of his daughter, and give direction for her funeral, in the absence of her husband. There appears, then, a sufficient consideration on the record to maintain this action. But besides this, the defendant, by paying money into court, acknowledges that the action was well brought; he pays it in full discharge, and therefore confesses a ground of action on every count of the declaration. *Cox v. Parry*.²

The cause of action therefore being admitted, a demurrer to evidence could not be supported, and the jury ought not to have been prevented from ascertaining the *quantum* of damages.

Runnington in reply. This is an abstract question of law, whether or not there appears a sufficient consideration on the record? As to presuming that the defendant gave a previous consent to the plaintiff, there is no reason to warrant such a presumption. Admitting that decency required the plaintiff to direct the funeral, yet the charges made were greater than were necessary. But if the plaintiff has a right in law to recover, the sum cannot be apportioned, and he must recover the whole. Though the case of *Hawkes v. Saunders* be good law, it does not affect the present, as in that there was both consent and an equitable consideration, which are wanting in this. As to payment of money into court, it does not admit a right of action to the extent contended for, but only for so much as is really paid in. The practice of paying money into court arose from the court's permitting, on equitable grounds, the defendant, after the action was commenced, to have the advantage of a plea of tender when he was too late in fact to plead it. If the plaintiff takes the money out of court, he is entitled so far to costs; but if he proceeds, it is at his peril, and beyond this he is subject to strict legal proof. The case of *Cox v. Parry* is in favor of the defendant; the words of Mr. Justice ASHHURST in delivering the opinion of the court in that case are, "As the defendant has paid money into court, he has thereby admitted that the plaintiffs are entitled to maintain their action to the amount of that sum, but he has admitted nothing more."

LORD LOUGHBOROUGH. This demurrer to evidence strikes me as being extremely absurd, since by payment of money into court, the defendant admits a cause of action (so that where money is paid into court, there can be no such thing as a nonsuit); and also, because it was for the jury to determine the *quantum* of damages. The court cannot anticipate the province of a jury, and ascertain damages on a writ of inquiry. It was not my

¹ Cowp. 290.

² 1 Term Rep. B. R. 464.

intention that any of the debts contracted by the defendant's wife, which the plaintiff discharged after her death, should have gone to the jury : but as the counsel for the defendant thought proper to demur to the evidence, the judgment on the demurrer must be general. They ought at the trial to have contended for a verdict ; they seem to me to have taken the wrong method for their client.

I think there was a sufficient consideration to support this action for the funeral expenses, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands ; the money, therefore, which the plaintiff paid on this account was paid to the use of the defendant. A father also seems to be the proper person to interfere in giving directions for his daughter's funeral, in the absence of her husband. There are many cases of this sort, where a person having paid money which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid ; such as in the instance of goods being distrained by the commissioners of the land-tax, if a neighbor should redeem the goods, and pay the tax for the owner, he might maintain an action for the money against the owner.

GOULD, J. It appears from this demurrer that the defendant was possessed of a plantation in Jamaica, from the time he left his wife till her death, which annually produced above 120 hogsheads of sugar ; the value of which, at a moderate estimation, amounted to near 3000*l.* a year. He was therefore bound to support her in a manner suitable to his degree ; and the expenses were such as were suitable to his degree and situation in life. The law takes notice of things suitable to the degree of the husband, in the paraphernalia of the wife, and in other respects. In the present case, the demurrer admits that the money was expended on account of the wife, and being for things suitable to the degree of the husband, the law raises a consideration, and implies a promise to pay it.

HEATH, J. The defendant was clearly liable to pay the expenses of his wife's funeral.

WILSON, J. If the plaintiff in this case had declared as having himself buried the deceased, the husband clearly would have been liable ; and as the case stands at present, the plaintiff having defrayed the expenses of the funeral, the husband is in justice equally liable to repay those expenses, and in him the law will imply an assumpsit for that purpose.¹

Judgment for the plaintiff.

¹ Ambrose v. Kerrison, 10 C. B. 776; Bradshaw v. Beard, 12 C. B. N. S. 344, *accord.* — ED.

ATKINS AND OTHERS v. BANWELL AND ANOTHER.

IN THE KING'S BENCH, JULY 2, 1802.

[Reported in 2 East, 505.]

AN action of *indebitatus assumpsit* was brought by the plaintiffs, as the parish officers of Toddington in the county of Bedford, against the defendants as the parish officers of Milton Bryant in the said county, to recover 14l. 12s. for money paid, laid out, and expended by the plaintiffs for meat, drink, board, lodging, medicines, medical assistance, and other necessities found and provided by them for one John Mitchell, his wife and family; to which the general issue was pleaded. And at the trial before GROSE, J., at the last Bedford assizes, a verdict was found for the plaintiffs, subject to the opinion of the court on the following case.

The plaintiffs are the parish officers of Toddington, and the defendants are the parish officers of Milton Bryant. John Mitchell was a pauper legally settled at the time of his illness and death, hereafter mentioned, in Milton Bryant, but he resided with his wife and family at Toddington, and was there suddenly attacked with dangerous illness, which prevented his being removed from the place of his residence to that of his settlement without endangering his life. The plaintiffs gave notice to the defendants of the illness of their pauper within two or three days after the pauper was so taken ill. The pauper's illness continuing, he afterwards, and about three weeks from such notice, died of such illness in the parish of Toddington; and the plaintiffs, as parish officers of that parish, from the time of such notice up to the pauper's death, laid out 14l. 12s. as well for necessities for the pauper and his family, as for medicines and medical assistance for the pauper, and also on the funeral of the pauper after his death. The present action was brought to recover that sum. The jury found that there was no express promise of the defendants to pay it to the plaintiffs. The question for the opinion of the court was, Whether such action be maintainable in law? If the court should be of that opinion, then the verdict for the plaintiffs was to stand; if not, a nonsuit to be entered.

Best for the plaintiffs, said that there was a moral obligation at least in the defendants to repay the money expended for one of their own parishioners, whom by law they were compellable to maintain within their own parish; and therefore this case fell within the principle of *Watson v. Turner*,¹ where an apothecary recovered against the parish officers for the cure of a pauper of the parish who was taken ill in another parish; there, however, there was a special promise to pay the plaintiff's bill after it was contracted.

¹ Scacc. Trin. 7 Geo. 3; Bull. N. P. 129, 147, 281.

LORD ELLENBOROUGH, C. J. That last circumstance makes all the difference. A moral obligation is a good consideration for an express promise; but it has never been carried further, so as to raise an implied promise in law. There is no precedent, principle, or color for maintaining this action.

LE BLANC, J. There was a moral as well as legal obligation to maintain the pauper in his illness in the parish where he was at the time.

Per Curiam.

Let a nonsuit be entered.

ROGERS v. PRICE, EXECUTOR.

IN THE EXCHEQUER, HILARY TERM, 1829.

[Reported in 3 *Younge & Jervis*, 28.]

ASSUMPSIT by the plaintiff against the defendant, executor of Davies, for work and labor as an undertaker and materials furnished for the funeral of Davies. Plea, *non assumpsit*.

At the trial, which took place before GASELEE, J., at the Hereford summer assizes, 1828, it appeared that the testator died in Wales, at the house of his brother, who, thereupon, sent for the plaintiff, an undertaker residing at a distance. The plaintiff afterwards furnished the funeral, and the brother of the deceased attended it as chief mourner. It was admitted that the funeral was suitable to the degree of the deceased. Upon these facts, there being no evidence of any contract made by the defendant, or that he knew of the funeral until after it had taken place, the learned judge was of opinion that the plaintiff was not entitled to recover, and directed a nonsuit, with leave to enter a verdict for the plaintiff for 30*l.*, if this court should think him entitled to recover.

In Michaelmas term last, *Russell*, Serjeant, in pursuance of this leave, obtained a rule calling upon the defendant to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for 30*l.*; and in support of the application cited the case of *Tugwell v. Heyman*.¹

Maule showed cause.

Russell, Serjeant, and *Evans, John*, in support of the rule.

GARROW, B. It would, in my opinion, have been more satisfactory, if this case had been submitted to the consideration of a jury, to inquire upon whose credit the funeral was provided; but, that course not having been pursued, we must dispose of this rule in its present form. I am of opinion that the plaintiff is entitled to recover, and that therefore this rule must be made absolute. The simple question is, notwithstanding many in-

¹ 3 Campb. 298.

genious views of the case have been presented, who is answerable for the expenses of the funeral of this gentleman. In my opinion, the executor is liable. Suppose a person to be killed by accident at a distance from his home; what, in such a case, ought to be done? The common principles of decency and humanity, the common impulses of our nature, would direct every one, as a preliminary step, to provide a decent funeral, at the expense of the estate; and to do that which is immediately necessary upon the subject, in order to avoid what, if not provided against, may become an inconvenience to the public. Is it necessary in that or any other case to wait until it can be ascertained whether the deceased has left a will, or appointed an executor; or, even if the executor be known, can it, where the distance is great, be necessary to have communication with that executor before any step is taken in the performance of those last offices which require immediate attention? It is admitted here that the funeral was suitable to the degree of the deceased, and upon this record it must be taken that the defendant is executor with assets sufficient to defray this demand; I therefore think that, if the case had gone to the jury, they would have found for the plaintiff, and that therefore this rule should be made absolute.

HULLOCK, B. I concur in thinking that, under the circumstances detailed in this case, the defendant is liable, and that therefore this rule should be made absolute. The argument on the part of the defendant has taken a very wide and extended range, and embraced a variety of topics, many of which are of considerable difficulty, but upon which it is unnecessary in this case to express any opinion. The question is, whether an executor (which, upon this record, I assume the defendant to be), with assets, is answerable in point of law for the funeral expenses of his testator, in the absence of evidence to charge any other individual. We are not required in this case to decide, whether an undertaker has a right to bury anybody that is kept uninterred for any length of time; or whether one who voluntarily performs these offices is entitled to recover; or whether, where express orders are given, the party giving those orders is answerable for them; because in my opinion those questions do not here arise. I do not think that in this case there is any evidence to show that the plaintiff acted upon the credit of the brother of the deceased. He might have said, I will have somebody to whom I may look for payment before I will proceed; but of that there is no evidence, and we therefore must infer that no such understanding took place. In every case the undertaker must be sent for, but that is not giving an order so as to create a liability; he must in every case be apprised of the death, but that will not render the party who makes the communication answerable, any more than in the case of casual poor, to which allusion has been made. It is then said, that, if a contract be implied, it must in this case be to defray the expenses of a funeral suitable to the degree of the testator. I do not think that it is necessary to enter

Question
involved

upon that point. An undertaker is not to indulge in speculations on the amount of the estate of the deceased ; but we must, upon the admission at the trial, assume this to be a funeral such as in ordinary cases would be required. There is another objection made, viz., that this defendant is sued as executor, and that therefore it was incumbent upon the plaintiff to prove him to be an executor. I agree that there would be a difficulty in pleading *plene administravit*, but still, inasmuch as the liability of the defendant arises in this case out of two circumstances, his character, and his ability to pay, I am not sure that he might not have shown the want of assets under the general issue ; but at all events, it would be more prudent to plead that fact. This is a difficulty which does not very often occur. This obligation does not arise in respect of an act during the lifetime of the testator, but of an implied obligation arising out of the situation of the executor with reference to his character and the estate of his testator. It is also said, that the executor is not bound to bury the dead within a certain time. That question does not arise in this case. If the executor had kept the body unburied, and the undertaker had come and said, I insist on burying it, he could not have recovered. But there is no evidence here that the person by whom this body was interred knew whether there was or was not an executor. It is the duty of the executor to dispose of the testator in the usual manner, viz. : by burying him. It is not that sort of duty which can be enforced by *mandamus* or other proceedings at law ; but it is a duty which decency and the interest of society render incumbent upon the executor. The case of *Tugwell v. Heyman*¹ is precisely similar to the present, and I for one should have great difficulty in departing from an authority with which the feelings of all mankind must so fully concur. The instance alluded to, of the liability of parish officers in respect of casual poor, appears to me to be a strong authority in support of the doctrine in the former case ; because in like manner an implied contract may in this case be inferred, on the part of the executor, from the obligation imposed upon him with reference to his character and the estate of his testator.

VAUGHAN, B. I agree in the judgment which has been delivered by my learned brothers, and shall make but few observations upon the case. Looking to the record, I must assume that the defendant is executor, and has assets sufficient to pay this debt. I should certainly have been better satisfied, if, at the trial, it had been left to the jury to say whether the plaintiff performed the contract upon the credit of any other person ; because, if that was the case, I am of opinion that the executor would not be liable. That course was not, however, pursued, and upon this report we are at liberty to infer that it was not done upon the credit of any third person. The discussion then resolves itself into a mere question, whether an executor is liable to pay the funeral expenses of the testator, where he

¹ 3 Campb. 298.

has assets and no unnecessary expense is incurred. I do not consider this as a duty of imperfect, but one of imperative obligation. It is not pretended that there was in this case any opportunity to consult the executor, who lived at a distance; and what under such circumstances could be done, if the defendant is not liable? The *dictum* of Lord Chief Justice HOLT is expressly at variance with the opinion of Lord ELLENBOROUGH, and, were it necessary, I should feel no difficulty in assenting to the latter authority; but it is not necessary to draw any comparison between the two cases, because, from the note of the former, it does not appear under what circumstances that opinion was delivered. The latter is a case precisely applicable to the present, acquiesced in by the counsel, and confirmed, if confirmation were required, by the opinion of the Chief Justice of the Court of Common Pleas. I consider the burial of the dead to be a clear obligation upon the executor, and think that he is liable for the expenses incurred, if in his absence that duty be performed for him by another.

Rule absolute.

BOULTON v. JONES.

IN THE EXCHEQUER, NOVEMBER 25, 1857.

[*Reported in 27 Law Journal Reports, 117.*¹]

ACTION in the Passage Court of Liverpool, for goods sold.

Plea, never indebted.

The evidence was, that on the 13th of January the defendant sent to the shop of one Brocklehurst, who had that day, unknown to the defendant, sold his stock-in-trade and assigned his business to the plaintiff, an order in writing, addressed to Brocklehurst, for certain goods. The goods were sent by the plaintiff, and at the trial the written order appeared with Brocklehurst's name struck out, but there was no evidence when that was done. There was contradictory evidence on a collateral point, but none as to whether the defendant had notice of the change of business before the plaintiff sent in an invoice, which was not until after the goods were consumed. The defendant had a set-off against Brocklehurst. The objection was taken that the contract was with him and not the plaintiff, and the learned Assessor reserved the point.

The jury found for the plaintiff, and *Mellish* had obtained a rule to enter it for the defendant, or to enter a nonsuit.

M'Oubrey showed cause. The verdict concludes the question. The point was not reserved that on the whole evidence the contract was with Brocklehurst.

¹ This case is also reported, but not so fully, in 2 H. & N. 564. — Ed.

[POLLOCK, C. B. If that were so, nothing could have been reserved.]

The goods were clearly the plaintiff's, and the writing was not conclusive to show that the contract was not with him. *Humble v. Hunter*¹ and *Rayner v. Grote*.² The defendant might have pleaded his set-off, goods having been sold by one in the name of another. If the plaintiff cannot sue the defendant, Broeklehurst cannot, and the price cannot be recovered. The defendant would be liable if he had notice, and the jury must be taken to have found that he had.

Mellish, for the defendant, in support of the rule. The contract was with Brocklehurst, and that was the question reserved.

[The court referred to the learned Assessor, who was in court, and he certified that this was so.]

The case is not one of principal and agent, and that disposes of the case cited. Moreover, as to *Humble v. Hunter*, it has not been approved of, and in *Rayner v. Grote* the defendant had notice.

[CHANNELL, B. Here he might have been liable. Could he have returned the goods when he received the invoice in the plaintiff's name?]

Supposing the goods were then *in esse*, but they were not so. There was, therefore, no evidence of an implied contract with the plaintiff, and the express contract was with Brocklehurst. Then, there could not have been a set-off. *Isberg v. Bowden*.³ And, on the other hand, the plaintiff could sue in the name of Brocklehurst, the contract having been made in his name, though of course subject to the set-off. It cannot be permitted to the plaintiff to sue the defendant on a contract he never made, so as to deprive him of a set-off. The question is, not whose are the goods, but with whom was the contract?

POLLOCK, C. B. The point raised was this, whether the order in writing did not import, on the part of the buyer, the defendant, an intention to deal exclusively with Brocklehurst; the person who had succeeded him, the plaintiff, having executed the order without any notice to the defendant of the change, until he received the invoice, subsequently to his consumption of the goods. The decision of the jury did not dispose of that point, and it was the point reserved. Now the rule of law is clear, that if you propose to make a contract with A., then B. cannot substitute himself for A. without your consent and to your disadvantage, securing to himself all the benefit of the contract. The case being, that if B. sued, the defendant would have the benefit of a set-off, of which he is deprived by A.'s suing. If B. sued, the defendant could plead his set-off; as B. does not sue, but another party with whom the defendant did not contract, all that he can do is to deny that he ever was indebted to the plaintiff.

MARTIN, B. That being the point, there can be no doubt upon the

¹ 12 Q. B. 310; s. c. 17 L. J. R. N. S. Q. B. 350.

² 15 Mee. & W. 359; s. c. 16 L. J. R. N. S. Ex. 79.

³ 8 Ex. 852; s. c. 22 L. J. R. N. S. Ex. 322.

matter. This was not a case of principal and agent at all, because the plaintiff was not Brocklehurst's agent, but his successor in the business, and made the contract on his own account, not for the plaintiff. Where the facts prove that the defendant never meant to contract with A. alone, B. can never force a contract upon him; he has dealt with A., and a contract with no one else can be set up against him.

BRAMWELL, B. It is an admitted fact, that the defendant supposed he was dealing with Brocklehurst; and the plaintiff misled him by executing the order unknown to him. It is clear also, that if the plaintiff were at liberty to sue, it would be a prejudice to the defendant, because it would deprive him of a set-off, which he would have had if the action had been brought by the party with whom he supposed he was dealing. And upon that my judgment proceeds. I do not lay it down that because a contract was made in one person's name another person cannot sue upon it, except in cases of agency. But when any one makes a contract in which the personality, so to speak, of the particular party contracted with is important, for any reason, whether because it is to write a book or paint a picture or do any work of personal skill, or whether because there is a set-off due from that party no one else is at liberty to step in and maintain that he is the party contracted with, — that he has written the book or painted the picture, or supplied the goods; and that he is entitled to sue, although, had the party really contracted with sued, the defendant would have had the benefit of his personal skill, or of a set-off due from him. As to the difficulty suggested, that if the plaintiff cannot sue for the price of the goods, no one else can, I do not feel pressed by it any more than I did in such a case as I may suppose, of work being done to my house, for instance, by a party different from the one with whom I had contracted to do it. The defendant has, it is true, had the goods; but it is also true that he has consumed them and cannot return them. And that is no reason why he should pay money to the plaintiff which he never contracted to pay, but upon some contract which he never made, and the substitution of which for that which he did make would be to his prejudice, and involve a pecuniary loss by depriving him of a set-off.

CHANNELL, B. The plaintiff is clearly not in a situation to sustain this action, for there was no contract between himself and the defendant. The case is not one of principal and agent; it was a contract made with B., who had transactions with the defendant and owed him money, and upon which A. seeks to sue. Without saying that the plaintiff might not have had a right of action on an implied contract, if the goods had been in existence,¹ here the defendant had no notice of the plaintiff's claim, until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not, of course, have returned them. Without saying

¹ It was held in *Mudge v. Oliver*, 1 Allen, 74, that these facts would support a count for goods sold and delivered. — *Ed.*

what might have been the effect of the receipt of the invoice before the consumption of the goods, it is sufficient to say that in this case the plaintiff clearly is not entitled to sue and deprive the defendant of his set-off.

Rule absolute for a nonsuit.

LEIGH AND ANOTHER v. DICKESON.

IN THE COURT OF APPEAL, NOVEMBER 22, 1884.

[Reported in Law Reports, 15 Queen's Bench Division, 60.]

APPEAL by the defendant against the judgment of POLLOCK, B., in favor of the plaintiffs.

The facts of the case are fully set forth in the report of the proceedings before POLLOCK, B.,¹ and here it is necessary only to make the following short statement of them.

The plaintiffs were trustees of a lady named Eyles, and sought to recover from the defendant the sum of 24*l.* 9*s.* 6*d.*, which they alleged to be due to them from the defendant for the use and occupation by him of three-fourths of premises in Market Lane, Dover, for 264 days at the rate of 45*l.* per annum. In 1860 Mrs. Eyles was entitled to an undivided three-fourths of the house as tenant in common with another; and on the fourth of January in that year she, by lease, let to one Prebble for twenty-one years her interest at the rate of 33*l.* 15*s.* per annum. In 1865 the lease was assigned by Prebble to the defendant, who entered and paid rent. In 1871 the defendant purchased the one-fourth interest of the other tenant in common. On the 6th of January, 1881, the lease expired, but the defendant continued in possession. A correspondence then took place between the plaintiffs and the defendant and their solicitors with a view to continue the tenancy; but the plaintiffs asking for an advanced rent which the defendant was unwilling to pay, no further agreement was arrived at. Upon the facts POLLOCK, B., came to the conclusion that the occupation by the defendant, which occurred after the expiration of the lease in question on the 6th of January, 1881, must be referred, not to his right as tenant in common, but to his continuing in occupation as tenant at sufferance. He therefore gave judgment for the plaintiffs for 24*l.* 9*s.* 6*d.*, the amount claimed for use and occupation.²

The defendant by way of set-off and counter-claim³ sought to recover from the plaintiffs 80*l.*, which, he alleged, he had laid out and expended in substantial and other proper repairs and improvements upon the premises since the expiration of the lease. POLLOCK, B., was of opinion that the

*Set off for imp.
improvements*

¹ 12 Q. B. D. 194.

² 12 Q. B. D. 194, at p. 196.

³ Only so much of the case is given as relates to this question. — ED.

set-off and counter-claim could not be sustained in law, and gave judgment upon it for the plaintiffs.¹

Finlay, Q. C. and *C. A. Russell*, for the defendant.

Edward Pollock for the plaintiffs.

Cur. adv. vult.

The following judgments were delivered : —

BRETT, M. R. The *cestui que trust* of the plaintiffs and the defendant were tenants in common of a house ; the defendant has done certain repairs which may be taken to have been reasonable and proper ; he has paid for, or at least has become liable to pay for those repairs. An action having been brought against him, he seeks by a counter-claim to recover that money which he has paid or is liable to pay. The *cestui que trust* of the plaintiffs has derived benefit from the expenditure incurred by the defendant, and the defendant seeks to reimburse himself for the cost of the repairs in proportion to the benefit which the tenant in common with him has received. Does this counter-claim fall within any legal and recognized principle ? There was no express request by the tenant in common with him that he should expend the money. What are the legal conditions which enable a man who has expended money to recover it from another ? If money has been expended at the express request of another, an action will lie at the suit of the person expending it against the person pursuant to whose request it has been expended. If a person is employed as agent in a business which requires an expenditure in order that it may be carried on, it is equally clear that the principal must indemnify his agent for the expenditure which he incurs. But the law has gone further ; it has been laid down that if one person has requested another to do an act which will cost him money, that is, which will expose him to a legal liability to pay money, the law will imply a promise on the part of the person making the request to indemnify the other for the expenditure to which he has been subjected. But the law has gone even further, and it has been held that if a principal employs an agent in a business, in which by the usage thereof known to both parties at the time of employment, the agent, although he is under no liability by law, is bound, on pain of suffering an injury or loss in his business, to pay money, the principal is bound to indemnify the agent for the money which the latter may expend in the transaction of the business on his principal's behalf.² That, no doubt, is an extreme case, but it has been so decided. But it has been always clear that a purely voluntary payment cannot be recovered back. Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit : in this case, if he exercises his

¹ 12 Q. B. D. 194, at p. 200.

² It is presumed that the Master of the Rolls was alluding to *Read v. Anderson*, 13 Q. B. D. 779.

option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact that he is bound to accept it: in this case he has no opportunity of exercising any option, and he will be under no liability. Under which class does this case come? Tenants in common are not partners, and it has been so held: one of them is not an agent for another. The cost of the repairs to the house was a voluntary payment by the defendant, partly for the benefit of himself and partly for the benefit of his co-owner; but the co-owner cannot reject the benefit of the repairs, and if she is held to be liable for a proportionate share of the cost, the defendant will get the advantage of the repairs without allowing his co-owner any liberty to decide whether she will refuse or adopt them. The defendant cannot recover at common law; he cannot recover for money paid in equity, for that is a legal remedy: there is no remedy in this case for money paid. But it is said that there is a remedy in equity: a suit for a partition may be maintained in equity:¹ that is a remedy which is known and recognized in a court of equity; in a suit in the Chancery Division expenditure between tenants in common would be taken into account. Reference has been made during the argument to an old form of writ; it looks to be a writ of a mandatory nature: but it has proved to be wholly unworkable in a court of common law. Therefore the rights of tenants in common went into chancery, where a suit for a partition might be maintained. That is the only remedy which exists either at law or in equity. No such claim as that put forward in the present counter-claim can be found to have been upheld either at law or in equity. If the law were otherwise, a part-owner might be compelled to incur expense against his will: a house might be situate in a decaying borough, and it might be thought by one co-owner that it would be better not to repair it. The refusal of a tenant in common to bear any part of the cost of proper repair may be unreasonable; nevertheless, the law allows him to refuse, and no action will lie against him. The judgment of POLLOCK, B., was right, and this appeal must be dismissed.

COTTON, L. J. I am of the same opinion. The plaintiffs have brought an action to recover rent, and the defendant by his counter-claim raises the question whether one tenant in common is liable to another for the cost of repairs.

Then a question is raised as to repairs, and the objection is taken upon demurrer to the counter-claim. I think that it must be assumed that the house was in a bad state of repair, and that the repairs executed by the defendant were necessary. As to the claim for improvements, it has been

¹ A suit for a partition might formerly have been maintained in a court of common law: Co. Litt. 163 a; 31 Hen. 8, c. 1; 32 Hen. 8, c. 32; 8 & 9 Wm. 3, c. 31; but the writ was abolished by 3 & 4 Wm. 4, c. 27, s. 36.

// X Question

urged that no tenant in common is entitled to execute improvements upon the property held in common, and then to charge his co-tenant in common with the cost. This seems to me the true view, and I need not further discuss the question as to improvements. As to the question of repairs, it is to be observed that when two persons are under a common obligation, one of them can recover from the other the amount expended in discharge or fulfilment of the common obligation; but that is not the position of affairs here: one tenant in common cannot charge another with the cost of repairs without a request, and in the present case it is impossible even to imply a request. No action for money paid will lie at common law; and in equity there is no remedy against a co-tenant in common, except in the case which I will presently mention. It was suggested, however, that at common law a right of contribution existed between tenants in common; and reference was made to Fitz. Nat. Brev. 127: a form of the writ *de reparatione facienda* is there set out: but the language of the writ assumes that the tenants in common or joint tenants are bound to repair the mill or house; it assumes an obligation or duty towards third persons. The existence of this obligation or duty explains the writ. A similar explanation may be given of the writ of contribution mentioned in Fitz. Nat. Brev. 162. Reference was also made to Co. Litt. 200, where it is said that one tenant in common or joint tenant may have a writ *de reparatione facienda* against another; but Lord Coke is there referring to the form of writ given in Fitz. Nat. Brev. 127. I cannot assent to the suggestion that the passage in Co. Litt. 200, shows that one tenant in common may compel at his pleasure another tenant in common to contribute to the repairs of a house. I think that the passages in Fitz. Nat. Brev. 127, 162, do not present any difficulty, and are not inconsistent with the conclusion at which I have arrived. Therefore, no remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common; but in a suit for a partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition. Tenancy in common is an inconvenient kind of tenure; but if tenants in common disagree, there is always a remedy by a suit for a partition, and in this case it is the only remedy.

in case of partition
not to be recovered

LINDLEY, J. I am of the same opinion. This is a case as to the mutual rights of tenants in common, and two questions have arisen in the action, the one as to the right of the plaintiffs to recover rent, the other as to the right of the defendant to recover for repairs which he has caused to be executed.

The second question is, whether the plaintiffs are liable to pay a share in proportion to their interest of the cost of the repairs executed by the defendant. I will assume that the repairs in question were necessary and proper. I have looked at all the authorities cited during the argument, and I have not omitted anything likely to throw light upon the matter. Is there any obligation upon one tenant in common to contribute to expenses properly incurred by another tenant in common in respect of the property held in common? Does the law cast upon tenants in common the duty to contribute for the cost of maintaining the property in good condition? I have referred to the passages cited from Co. Litt. and Fitz. Nat. Brev.; but on looking into the matter more closely than I was able to do during the argument, I think that they do not support the contention for the defendant. Upon turning to Fitz. Nat. Brev., p. 162, where the nature of a writ of contribution is treated of, it is said: "The writ of contribution lieth where there are tenants in common, or who jointly hold a mill *pro indiviso*, and take the profits equally, and the mill falleth into decay, and one of them will not repair the mill; now the other shall have a writ to compel him to be contributory to the reparations." The form of the writ is then set out, from which it appears that the joint tenants "are bound to the reparation and support of the same mill." Two things strike me upon reading the form of the writ: first, it is a case of tenancy in common of a mill; secondly, all the tenants in common are bound to repair it. What obligation can there be on the owners of a mill to repair it, except upon two grounds? the one ground is where they are entitled to compel persons dwelling in the neighborhood to grind their corn at the mill; the other is where it would be a public nuisance to suffer the mill to go to decay. Neither of those grounds exists in the present case. Suppose a case where one tenant in common wishes to repair a house, and the other does not; no action at law and no suit in equity will lie to recover a contribution for the cost of the repairs, although all the tenants are necessarily thereby benefited. I have looked into the titles, "Account," "Contribution," and "Action upon the Case" in the Digests; and it is not a little singular that no remedy for any of the inconveniences attending a tenancy in common can be found except that of partition. Tenancy in common is a tenure of an inconvenient nature, and it is unfit for persons who cannot agree among themselves; but the evils attaching to it can be dealt with only in a suit for partition or sale, in which the rights of the various owners can be properly adjusted. It seems to me that this appeal must be dismissed.

Appeal dismissed.

BARTHOLOMEW v. JACKSON.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, MAY TERM, 1822.

[Reported in 20 Johnson, 28.]

IN error, on *certiorari* to a justice's court. Jackson sued Bartholomew before a justice, for work and labor, etc. B. pleaded *non assumpsit*. It appeared in evidence, that Jackson owned a wheat stubble-field, in which B. had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, J. sent a message to B., which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of B. answered, that they would remove the stack by ten o'clock the next morning. J. waited until that hour, and then set fire to the stubble in a remote part of the field. The fire spreading rapidly, and threatening to burn the stack of wheat, and J., finding that B. and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for B.; and he claimed to recover damages for the work and labor in its removal. The jury gave a verdict for the plaintiff for fifty cents, on which the justice gave judgment, with costs.

PLATT, J., delivered the opinion of the court. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a *certiorari* on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant; and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action. The judgment must be reversed.

Judgment reversed.

GEORGE H. CHASE v. JAMES CORCORAN.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1871.

[Reported in 106 Massachusetts Reports, 286.]

GRAY, J. The evidence introduced at the trial tended to prove the following facts: The plaintiff, while engaged with his own boats in the Mystic River, within the ebb and flow of the tide, found the defendant's boat adrift,

with holes in the bottom and the keel nearly demolished, and in danger of sinking or being crushed between the plaintiff's boats and the piles of a bridge unless the plaintiff had saved it. The plaintiff secured the boat, attached a rope to it, towed it ashore, fastened it to a post, and, after putting up notices in public places in the nearest town, and making other inquiries, and no owner appearing, took it to his own barn, stowed it there for two winters, and during the intervening summer made repairs (which were necessary to preserve the boat) and for its better preservation put it in the water, fastened to a wharf, and directed the wharfinger to deliver it to any one who should prove ownership and pay the plaintiff's expenses about it. The defendant afterwards claimed the boat; the plaintiff refused to deliver it unless the defendant paid him the expenses of taking care of it; and the defendant then took the boat by a writ of replevin, without paying the plaintiff anything. This action is brought to recover money paid by the plaintiff for moving and repairing the boat, and compensation for his own care and trouble in keeping and repairing the same, amounting to twenty-six dollars in all.

The plaintiff testified, without objection, that the boat, when found by him, was worth five dollars. He was then asked by his counsel, what, when he found it, he considered it worth. This evidence was properly rejected as immaterial.

The plaintiff requested the chief justice of the Superior Court to rule that the boat was not lost goods, within the sense of the Gen. Sts. c. 79. But the learned judge refused so to rule, and ruled that upon all the evidence the plaintiff could not maintain his action, and directed a verdict for the defendant. We are of opinion that this was erroneous.

There is no statute of the Commonwealth applicable to this case. Chapter 78 of the Gen. Sts., concerning "timber afloat or cast on shore," is expressly limited in all its provisions to "logs, masts, spars, or other timber," and does not include boats or vessels. Chapter 79, relating to "lost money or goods," and "stray beasts," found in any town or city, clearly applies to lost property found on land only, and not to property afloat on tidewaters, without the limits of any city or town, and within the admiralty jurisdiction of the United States.¹ Chapter 81 is "of wrecks and shipwrecked goods." These words, in their ordinary legal meaning, are confined to ships and goods cast on shore by the sea, and cannot be extended to a boat or other property afloat, not appearing to have been ever cast ashore, or thrown overboard or lost from a vessel in distress. Hale De Jure Maris, c. 7; 1 Hargr. Law Tracts, 37; 3 Dane Ab. 133; Sheppard v. Gosnold;² Palmer v. Rouse;³ Baker v. Hoag.⁴

The claim of the plaintiff is therefore to be regulated by the common law. It is not a claim for salvage for saving the boat when adrift and in

¹ 3 Dane Ab. 135.

² Vaugh. 159, 168.

³ 3 H. & N. 505.

⁴ 3 Selden, 555, 558.

danger on tide water; and does not present the question whether the plaintiff had any lien upon the boat, or could recover for salvage services in an action at common law. His claim is for the reasonable expenses of keeping and repairing the boat after he had brought it to the shore; and the single question is, whether a promise is to be implied by law from the owner of a boat, upon taking it from a person who has found it adrift on tide water and brought it ashore, to pay him for the necessary expenses of preserving the boat while in his possession. We are of opinion that such a promise is to be implied. The plaintiff, as the finder of the boat, had the lawful possession of it, and the right to do what was necessary for its preservation. Whatever might have been the liability of the owner if he had chosen to let the finder retain the boat, by taking it from him he made himself liable to pay the reasonable expenses incurred in keeping and repairing it. *Nicholson v. Chapman*; ¹ *Amory v. Flyn*; ² *Tome v. Four Cribs of Lumber*; ³ *3 Dane Ab. 143*; *Story on Bailments*, §§ 121 a, 621 a; *2 Kent Com. (6th Ed.) 356*; *1 Domat, pt. 1, lib. 2, tit. 9, art. 2.*

Exceptions sustained.

A. V. Lynde and C. Abbott, E. W. Sanborn with them, for the plaintiff.
No counsel appeared for the defendant.

BOSTON ICE COMPANY v. EDWARD POTTER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 28, 1877.

[*Reported in 123 Massachusetts Reports, 28.*]

CONTRACT on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial.

At the trial in the Superior Court, before WILKINSON, J., without a jury, the plaintiff offered evidence tending to show the delivery of the ice, and its acceptance and use by the defendant from April 1, 1874, to April 1, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the defendant, and informed him

¹ 2 H. Bl. 254, 258 and note.

² 10 Johns. 102.

³ Taney, 533, 547.

of its intended supply of ice to him ; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him ; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

J. P. Farley, Jr., for the plaintiff.

E. C. Bumpus and *E. M. Johnson* for the defendant.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell*.¹ And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it

¹ 104 Mass. 173, 177.

executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Oreutt v. Nelson*; ¹ *Winchester v. Howard*; ² *Hardman v. Booth*; ³ *Humble v. Hunter*; ⁴ *Robson v. Drummond*.⁵ If he had received notice and continued to take the ice as delivered, a contract would be implied. *Mudge v. Oliver*; ⁶ *Oreutt v. Nelson*; ¹ *Mitchell v. Lapage*.⁷

There are two English cases very similar to the case at bar. In *Schmalzing v. Thomlinson*,⁸ a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton v. Jones*⁹ was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject-matter of this action.

¹ 1 Gray, 536, 542.

² 97 Mass. 303.

³ 1 H. & C. 803.

⁴ 12 Q. B. 310.

⁵ 2 B. & Ad. 303.

⁶ 1 Allen, 74.

⁷ Holt N. P. 253.

⁸ 6 Taunt. 147.

⁹ 2 H. & N. 564.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence.

Exceptions overruled.

AMOS R. EARLE v. JESSE J. COBURN.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL 9, 1881.

[*Reported in 130 Massachusetts Reports, 596.*]

CONTRACT upon an account annexed for the board and stabling of the defendant's horse, from April 14, 1877, to January 17, 1878. Answer, a general denial. Trial in the Superior Court, before DEWEY, J., who reported the case for the determination of this court, in substance as follows:—

It was in evidence that, prior to April 14, 1877, the plaintiff had exchanged the horse in question with the defendant for a wagon; that a controversy arose between them as to the character of the transaction, and its effect upon the title of each in the property exchanged; that the defendant returned the horse to the stable of the plaintiff, and demanded of him the wagon; that the plaintiff refused to deliver the wagon, and the defendant thereupon left the horse on the plaintiff's premises and brought an action against the plaintiff for a conversion of the wagon; that at the trial of that action the then plaintiff introduced evidence to show that the transaction was of such a character that the then defendant acquired no title in the wagon, and that he acquired no title in the horse; and evidence was introduced by the then defendant to show that the exchange was complete, and that he acquired title to the wagon and parted with his title to the horse; and that in that action the jury returned a verdict for the defendant, upon which judgment was duly entered by the court.

It was also in evidence at the trial of the present action that, at the time the defendant left the horse at the plaintiff's stable, both parties disclaimed ownership; that the plaintiff told the defendant that if he left it on his premises he must do so on his own responsibility and expense; that the defendant told the plaintiff he would have nothing more to do with the horse, and would not be responsible for it; that, on August 1, 1877, the plaintiff told the defendant that he had got a horse of his at his stable and should charge him for its board and keeping, and that the defendant replied that he had no horse at the plaintiff's stable.

The horse was fed and stabled by the plaintiff during the whole time embraced in the declaration, and the defendant made no other provision for his care and keeping, and did not demand him of the plaintiff, and gave

him no orders respecting the same ; and the plaintiff testified that he never sent the defendant any bill for board and stabling of the horse, and never made any demand except as stated in the interview of August 1, 1877.

Upon this evidence, the judge ruled that the action could not be maintained, directed a verdict for the defendant, and reserved the question of the correctness of the ruling for the determination of this court.

J. Hopkins for the plaintiff.

A. G. Bullock for the defendant.

LORD, J. This case cannot be distinguished in principle from *Whiting v. Sullivan*.¹ In that case it was said, "As the law will not imply a promise, where there was an express promise, so the law will not imply a promise of any person against his own express declaration ; because such declaration is repugnant to any implication of a promise." As applicable to that case and to the case at bar, this language is entirely accurate. There may be cases where the law will imply a promise to pay by a party who protests he will not pay ; but those are cases in which the law creates a duty to perform that for which it implies a promise to pay, notwithstanding the party owing the duty absolutely refuses to enter into an obligation to perform it. The law promises in his stead and in his behalf. If a man absolutely refuses to furnish food and clothing to his wife or minor children, there may be circumstances under which the law will compel him to perform his obligations, and will of its own force imply a promise against his protestation. But such promise will never be implied against his protest, except in cases where the law itself imposes a duty ; and this duty must be a legal duty. The argument of the plaintiff rests upon the ground that a moral duty is sufficient to raise an implied promise, as well as a legal duty. He cites no authority for this proposition, and probably no authority can be found for it. The common law deals with and defines legal duties, not moral. Moral duties are defined and enforced in a different forum. Under the particular circumstances of this case, it would be futile to inquire what moral duties were involved, or upon whom they devolved. It is sufficient to say that no such legal duty devolved upon the defendant as to require him to pay for that for which he refused to become indebted. In *Boston Ice Co. v. Potter*,² the court refused to hold the defendant to an implied promise to pay for ice which he had received and consumed during a year or more ; and this upon the ground that a promise will not necessarily be implied from the mere fact of having derived a benefit. The cases arising in this country and in England are collated in the opinion in that case. Those cases, equally with *Whiting v. Sullivan*,¹ sustain the ruling of the presiding judge in this case.

*Judgment on the verdict.*³

¹ 7 Mass. 107.

² 123 Mass. 28.

³ *Force v. Haines*, 2 Harr. (N. J.) 385, *accord.* — Ed.

SECTION II.

UNINTENTIONALLY.

WALKER v. MATTHEWS.

IN THE QUEEN'S BENCH DIVISION, NOVEMBER 16, 1881.

[Reported in *Law Reports*, 8 *Queen's Bench Division*, 109.]

APPEAL from the Huntingdon County Court.

The plaintiff sued for the delivery of two cows and two calves belonging to him, valued at 45*l.*, and for special damages caused by their detention.

The defendant counter-claimed in respect of the keep of the cows and calves during the time they had been in his possession, and also for money paid and expenses incurred in respect of them respectively, 15*l.* 19*s.*, after allowing for the value of the milk of the cows.

At the trial before the County Court judge and a jury, it appeared that on the 7th of June, 1880, the two cows, then in calf, were stolen from the plaintiff's field. On the 11th of June, the thief, having driven them thirty miles, sold them in market overt to a cattle dealer, who on the 16th of June sold them to the defendant, a *bona fide* purchaser for value and without notice of the felony. On the 21st of June, the plaintiff, having traced the cows, demanded them of the defendant, who refused to give them up. They calved while in his possession, and were also ill of foot and mouth disease for a time. On the 5th of April, 1881, the thief was convicted of stealing the cows, and on the 9th of April notice of the conviction was given to the defendant, and the cows and calves were demanded of him on behalf of the plaintiff. The plaintiff established his right to the beasts, and objected that the defendant could not in law recover for the keep of them. The judge overruled the objection. The jury found a verdict for the plaintiff on the claim, and for the defendant 15*l.* 19*s.* on the counter-claim, and judgment to that amount on the counter-claim was given for the defendant.

A rule having been obtained calling on the defendant to show cause why judgment for the plaintiff on the counter-claim should not be entered,

Cockerell shewed cause. On conviction of the thief, the property reverted in the plaintiff;¹ and it is admitted that he could recover the animals, and even the value of the milk. *Scattergood v. Sylvester*.² Credit has therefore been given for the value of the milk yielded by the cows while in

¹ 24 & 25 Viet. c. 96, s. 100.

² 15 Q. B. 506; 19 L. J. N. S. Q. B. 447.

possession of the defendant. But he is entitled to be repaid for the cost of their keep, at least up to the conviction and demand. Until the conviction the property was in him, and he might have sold the beasts; instead of doing so he took care of them, and kept them during a time in which they were ill, and therefore unremunerative.

[LOPES, J. He was keeping his own property, and cannot, in the absence of any contract with the plaintiff, claim from him the costs of keep.]

It must be conceded then that his position is even worse as regards the expense of keeping them after the conviction and demand, when the property reverted and the detention became wrongful.

W. Garth, in support of the rule, was not heard.

GROVE, J. The judgment for the counter-claim was wrong in law, and the appeal must be allowed.

LOPES, J., concurred.

Rule absolute.

GILLET, ADMINISTRATOR OF CLEMENS v. MAYNARD.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, NOVEMBER
TERM, 1809.

[Reported in 5 Johnson, 85.]

THIS was an action of assumpsit for money had and received to the use of the plaintiff; and for work and labor performed, money lent, etc. Plea, *non assumpsit*. The cause was tried at the Oneida circuit, in June, 1809, before Mr. Justice YATES.

At the trial, the plaintiff offered to give in evidence a parol contract, between the intestate and the defendant, for the sale of one hundred acres of land, and that a sum of money had been paid by the intestate, and who had, after the making of the contract, and while in possession of the land, under the contract of sale, performed labor in clearing it, and that the defendant had since violated and abandoned the contract. The counsel for the defendant objected to this evidence; but the judge admitted it, subject to the opinion of the court upon the facts as they should appear on the evidence. The plaintiff then proved, that in May, 1803, Clemens, the intestate, made a parol contract with the defendant, for the purchase of one hundred acres of land, in the Oneida Reservation, at \$8 per acre. \$20 were paid; and one-half of the purchase-money was to be paid in 1812, when the defendant's bond and mortgage, given to the State for the land, became due, and the residue in a reasonable time thereafter. This was proved by a witness who was present at the conversations between the intestate and the defendant, and while the former was in possession of the land. It appeared also, that the intestate, in 1803, sold fifty acres of the land to A. C., who agreed to pay the purchase-money to the defendant, and who accord-

ingly paid him \$133. In November, 1807, the plaintiff called on the defendant, who exhibited to him an account, in which he acknowledged that he had received of the intestate various payments on account of the land, making the sum of \$188, and with the interest amounting to \$263.36. It was also proved, that the intestate cleared, enclosed, and sowed eight acres of the land. In the autumn of 1807, the plaintiff offered to pay the defendant \$24.60, on account of the fifty acres possessed by the intestate, which the defendant refused to receive; and when the plaintiff demanded a deed, he refused to give any, or to do anything about it. In December following, the plaintiff made a formal tender of the money, and demanded a deed; but the defendant would not receive it, or execute a deed.

The defendant proved, that the intestate by his agreement was to pay \$400 in 1803, and that the residue of the purchase-money was to be secured by bond and mortgage, and the deed to be given when the first payment was made; that in the autumn of 1807, the defendant took possession of the fifty acres which the intestate had possessed, and sold them to another person.

The judge charged the jury, that the plaintiff was entitled to recover, not only for the money paid by the intestate, but also for the clearing and improvements on the land. The jury found a verdict, accordingly, for \$413.36.

A motion was made to set aside the verdict; and the case was submitted to the court, without argument.

THOMPSON, J., delivered the opinion of the court. This was an action for money had and received, and for work, labor, and services. The object of the suit, as appears by the case, was to recover back money paid by the intestate to the defendant, on a parol contract for the purchase of a tract of land, which contract had never been fully executed; and also to recover compensation for the improvements made by the intestate while in possession of the land under such contract. It does not satisfactorily appear from the case, what were the precise terms of the contract made in the year 1803. It is obvious, however, from what passed between the parties in the spring of 1807, that neither of them pretended that the terms of the contract had been complied with. The conduct of the defendant can be viewed in no other light than as a relinquishment of the contract. He refused to receive any more money from the plaintiff. He took back the possession of the premises, which had previously been in the possession of the intestate; offered them for sale, and actually delivered over the possession to a third person. These acts are altogether inconsistent with a claim to have the contract completed. If the contract be considered as rescinded, no doubt can be entertained but that the plaintiff is entitled to recover back the money paid by the intestate. The case of *Towers v. Barrett*¹ fully establishes the principle, that assumpsit for money had and

¹ 1 T. R. 133.

received lies to recover back money paid, on a contract which is put an end to; either where, by the terms of the contract, it is left in the plaintiff's power to rescind it, by any act, and he does it, or where the defendant afterwards assents to its being rescinded. I see no ground, therefore, upon which the defendant can resist a reimbursement of the sums he has received as a payment upon the contract which he has himself put an end to. The plaintiff, however, ought not to have recovered any compensation for the improvements. There was no express or implied undertaking by the defendant to pay for them. When the work was done by the intestate, it was for his own benefit; and if he voluntarily abandoned his contract, without any stipulation as to the improvements, he must be deemed to have waived all claim to any compensation for them.

The verdict ought, therefore, to be reduced to \$263.36, being the money actually advanced, and the interest. Upon the plaintiff's consenting to take judgment for that sum only, and to remit the residue, the motion on the part of the defendant will be denied; otherwise it is granted with costs to abide the event.

Judgment accordingly.

SHREVE v. GRIMES.

IN THE COURT OF APPEALS OF KENTUCKY, OCTOBER 20, 1823.

[*Reported in 4 Littell, 220.*]

UNDER a decree in favor of the now appellant, the mills and farm of a certain Thomas Caldwell were sold, and the appellant became the purchaser. Grimes, the present appellee, resided upon the estate at the time, claiming under some contract made with Caldwell, as a purchaser from him; but of what kind does not appear in this cause. Immediately after the purchase, Grimes agreed to become the tenant of the appellant, and to receive and hold possession under him, for one year; and accordingly, an article of agreement was entered into and signed by the parties, in which the appellee stipulated to pay the rent of \$750, and passed his notes for the same, payable by instalments of three, six, nine, and twelve months, each being \$187.50; and at the end of the term, bound himself to restore the estate. The appellant stipulated to keep the appellee in possession, and to allow the appellee a credit for such necessary and lasting improvements or repairs as should be requisite in the opinion of the appellee, and be consented to by the appellant, during the term, to the amount of \$226.80, and no more, on the last instalments. At the close of this year, a new lease was made for one year longer, and reduced to writing, in the form of an article of agreement signed by the parties, in which the same rent was stipulated, with a little variation as to the instalments; and also

an agreement that the last instalment, which was \$200, might be expended "in repairs to said mills, provided that the necessary repairs to the mills might require that sum within the year, in the opinion and judgment of both parties, or so much thereof as might be judiciously expended in repairs, in the judgment of both parties."

After the close of the last year, the appellee brought this action of assumpsit, and declared in two counts for work and labor, care, diligence, and materials expended on the mills and farm aforesaid, during the existence of the aforesaid leases, and exhibited and proved a large account for improvements done upon the premises, of nearly \$1400 value, and showed that the prices were reasonable. He also proved, that while he was building a bridge across the mill-dam, the appellant was there and dined with the appellee, and said in conversation at that time that the job was an arduous undertaking, but he had no doubt it would be useful; that the appellant lived in the neighborhood, and was at and passed the mills frequently, and as often conversed with the appellee while the work was doing; but the witnesses did not hear what was said. One of these occasions was while the appellee was clearing of land, which was an act directly contrary to the stipulations of the lease. One witness deposed, that on the day of sale the commissioner appointed to execute the decree, by selling the farm and mills, who is since dead, informed him that the appellant had bought the land and mills; but the appellee was to keep them, and had purchased them of the appellant by a parol agreement, and was to pay interest at the rate of ten per centum per annum on the amount of the price, which was the same sum due from Caldwell to the appellant, for which the land was sold, that is, \$5000, with some interest and costs, until he, the appellee, paid up the price. The witness further stated, that in a conversation with the appellant, a few days afterwards, the precise expressions of which he could not recollect, his impression was, that he understood about the same thing from the appellant which he had learned from the commissioner. But some time afterwards, he, the witness, was informed that the appellee held the mills under lease.

The appellant on his part introduced the leases, or two articles of agreement, which appeared to be in his own handwriting, except the signatures of the witnesses and appellee. He proved that at the close of the first year he settled with the appellee, and gave him credit for an account for improvements and repairs, to the amount of \$211.75, being all the improvements then claimed, and took his note for the balance of rent then due, on which he, the appellee, afterwards confessed judgment, after a small credit was indorsed for grinding and sawing. This last witness, who was the appellant's son-in-law, heard no further claim for improvements at that time. The same witness further stated, that at the time the second agreement or lease was entered into, he went with the appellant to the appellee's house, when the appellant proposed to rent the mills another year. The

appellee appeared to be angry, and observed that he might as well die by the sword as famine ; but after a while he was reconciled and entered into the second agreement. This was, in substance, all the evidence, except such as went either to increase or diminish, on the respective sides, the value of the improvements for which the suit was brought.

The appellee, on this evidence, contended that there was a sale to him, verbally, of the farm and mills, known only to the commissioner ; that the leases were only colorable, to cover the interest of ten per centum on the price ; while the appellant insisted for the transaction being as stated upon the face of the writings, and that there was no sale.

The counsel for the appellee moved the court to instruct the jury, that if they should find from the evidence that the appellee made the improvements claimed, under a verbal agreement for the purchase of the property which had never been consummated or reduced to writing, the appellee was entitled to a verdict for their value, so far as the improvements were necessary and valuable to the appellant, as proprietor of the soil, and made with his privity, consent, and approbation. This instruction was given by the court.

The appellant moved the court on his part to instruct the jury, that if they were satisfied, from the evidence, that the contracts for renting the premises were reduced to writing, they could not find for the appellee in this form of action, unless the parties authorized the making of the improvements by some subsequent contract. This application was overruled by the court.

After verdict, the appellant moved for a new trial, on the ground that the verdict was against the law and evidence of the case. This motion was, also, overruled. And the appellant, having excepted to these opinions and spread the evidence upon the record, has brought the whole case before this court by appeal ; and in his assignment of error complains of these decisions of the court below.

The principle involved in the instruction given by the court below contains within it this simple inquiry, can a person who has bought and possesses land by a parol contract, which cannot be enforced under our act to prevent frauds and perjuries, recover from his vendor the ameliorations and improvements made upon the land, while he thus held it, in an action of assumpsit ?

It has been already settled by this court, in the case of *Keith v. Paton*,¹ that the consideration paid for land under such circumstances may be recovered back ; and it seems evident, that an action for money had and received, or detinue or trover for the property paid, or a *quantum meruit* for labor and services, paid as the price of the land, might be recovered back. But whether the ameliorations of the soil made in the mean time can be so recovered, is a different question. No doubt, the party, in

¹ 1 Marsh. 23.

some such cases, is entitled to some remedy for improvements, and the opposite side for rents and profits; and this court has, in suits in chancery, directed one to be discounted against the other. But still this does not answer the question, whether any action at law can be brought, and if so, is this the proper one? The jurisdiction of a court of equity over a subject is not conclusive that no action at law will lie.

We have said, that in some such cases recovery for ameliorations may be had. But we would not be understood as saying that such recovery could be had in every case; for if the purchaser should choose to live upon the land at such an uncertainty, and should make such amelioration, and should himself disaffirm the contract and never offer to fulfil it, and cast the improvements made upon the hands of his adversary, and thus attempt to make him a debtor to that amount, against his consent, and without his default, the right to recover the value of improvements, in such case, would be very problematical. At all events, if in such case they could be recovered, it could not be in an implied assumpsit; for there would be no ground to presume a promise or undertaking.

If we take this case on a still broader ground, we should be at a loss to perceive the principle on which an action of assumpsit could be maintained. In the case of money or property paid to the vendor, for the land itself, when he had only given his promise to convey, and should refuse to fulfil it, as such promise is of no avail in law, the price may be recovered back, on the principle that the consideration on which it was paid happens to fail. But, with regard to ameliorations made under such circumstances, they are not designed for the use of the seller. He is not instrumental in causing them to be made, as he is in case of payment of the price. They may or may not be made, at the election of the purchaser; and in searching the principles over for which an implied assumpsit will lie, we discover not one which would support the action. If the seller can be at all made liable for them, it must be on the principle of equity, that he ought not, when the improvements are delivered over to him, to be enriched by another's loss.

It is true, an implied assumpsit will lie for work and labor done for the defendant upon his request and assent, without any fixed price or any express promise to pay; but the labor must be his, and the work be done for him, and not for another, and the work afterwards happen to become his, before the action can be sustained. We, therefore, conceive that whatever remedy the appellee may have, it is not by an implied assumpsit for work and labor, and that the court below consequently erred in instructing the jury that the appellee was entitled to recover, if the facts should be as he contended. If this question was not against the appellee, we should not be disposed to disturb the verdict, because the court overruled the application to instruct made by the appellant. The proposition made by him involved in it the principle, that the writings controlled the contract and excluded the parol evidence of a verbal sale. It is true that writings can-

not, in general, be affected or varied by parol proof; but it is the effect of the statutes against usury to alter this principle, and to let in the parol proof, to show thereby that there was usury, although the writings negative the fact.

As to the question of a new trial, it is unnecessary to say anything, as it necessarily results from the opinion already expressed, that the court below ought not to have permitted the verdict to stand.

The judgment must be reversed with costs, and the verdict be set aside, and the cause be remanded, for new proceedings to be there had, not inconsistent with this opinion.

SAMUEL ALBEA v. WILLIAM GRIFFIN *et al.*

IN THE SUPREME COURT OF NORTH CAROLINA, JUNE TERM, 1838.

[*Reported in 2 Devereux & Battle, Equity, 9.*]

THIS was a bill for the specific execution of a contract for the sale of a tract of land containing fifty acres. The defence was the act of 1819 avoiding parol contracts for the sale of land and slaves.

Upon the hearing the case was, that the ancestor of the defendants contracted to convey the land to the plaintiff for fifty dollars, to be taken up in goods at the store of the plaintiff; that the goods were in part delivered; that the land was surveyed, and the plaintiff put in possession of it by the vendor; that he, the plaintiff, built a house upon it; and that the vendor gave him the assistance in raising it which is usual between neighbors in the country. The vendor died without having executed a deed for the land, and it descended to the defendants.

Caldwell for the plaintiff.

Burton for the defendant.

GASTON, J., after stating the facts as above, proceeded: It is objected on the part of the defendants that by our act of 1819 all parol contracts to convey land are void, and that no part performance can, in this State, take a parol contract out of the operation of that statute. We admit this objection to be well founded, and we hold as a consequence from it that, the contract being void, not only its specific performance cannot be enforced, but that no action will lie in law or equity for damages because of non-performance. But we are nevertheless of opinion that the plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and by the act of God, or by the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is

against conscience that they should be enriched by gains thus acquired to his injury. *Baker and Wife v. Carson*.¹ If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property.

The court therefore directs that it be referred to the clerk of this court, to inquire and report what is the additional value conferred on the land in question by the improvements of the plaintiff, and that he state an account between the parties, charging the plaintiff with a fair rent since the death of Andrew Griffin, and crediting him with what has been advanced towards payment for said land, and with the amount of the additional value so conferred upon it.

Per Curiam,

Decree accordingly.

JOHN BRIGHT *v.* JOHN W. BOYD.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIRST CIRCUIT,
MAY TERM, 1841.

[*Reported in 1 Story, 478.*]

BILL in equity. The defendant recovered judgment in a suit at law against the plaintiff for possession of an estate which the plaintiff claimed to own by intermediate conveyances under an administration sale. The defect in the plaintiff's title was due to the failure of the administrator to file a bond as required by law. The plaintiff, at the time of his purchase, supposed that this bond had been filed, and he seeks to recover compensation for permanent improvements made upon and greatly enhancing the value of the estate.²

STORY, J. The case, then, resolves itself³ into the mere consideration, whether the plaintiff is entitled to any allowance for the improvements made by him, or by those under whom he claims title, so far as those improvements have been permanently beneficial to the defendant and have given an enhanced value to the estate. There is no doubt that the plaintiff in the present bill is a *bona fide* purchaser for a valuable consideration, without notice of any defect in his title. Indeed, he seems to have had every reason to believe that it was a valid and perfect title; and this also seems to have been the predicament of all the persons who came in under the title by the administration sale; for it is not pretended that any one of them had actual notice that no bond was given to the judge of probate previous to the sale. And, indeed, all of them, including the purchaser at the sale, acted upon

¹ 1 Dev. & Bat. 381.

² This statement of facts, containing all that is necessary to an understanding of the case, has been substituted for the statement found in the report. — ED.

³ Only so much of the opinion is given as relates to this question. — ED.

the entire confidence that all the prerequisites necessary to give validity of the sale had been strictly complied with. The original purchaser was, if at all, affected only by the constructive notice which put him upon inquiry as to the facts necessary to perfect the right to sell. The statute of Maine of 27th of June, 1820, ch. 47, commonly called the Betterment Act, will not aid the plaintiff; for that statute applies only to cases where the tenant has been in actual possession of the lands for six years or more before the action brought by virtue of a possession and improvement, which term had not elapsed when this writ of entry was brought. So that in fact the whole reliance of the plaintiff must be upon the aid of a court of equity to decree an allowance to him for the improvements made by him and those under whom he claims, upon its own independent principles of general justice.

Two views are presented for consideration. First, that the defendant has lain by and allowed the improvements to be made without giving any notice to the plaintiff, or to those under whom he claims, of any defect in their title; which of itself constitutes a just ground of relief. Secondly, that if the defendant is not, by reason of his minority and residence in another State at the time, affected by this equity, as a case of constructive fraud or concealment of title; yet that, as the improvements were made *bona fide* and without notice of any defect of title, and have permanently enhanced the value of the lands, to the extent of such enhanced value the defendant is bound in conscience to make compensation to the plaintiff *ex aequo et bono*.

In regard to the first point, it has been well remarked by Sir WILLIAM GRANT (then Master of the Rolls) in *Pilling v. Armitage*,¹ "That there are different positions in the books with regard to the sort of equity arising from laying out money upon another's estate through inadvertence or mistake; that person seeing that, and not interfering to put the party upon his guard. The case with reference to that proposition, as ordinarily stated, is that of building upon another man's ground. That is a case which supposes a total absence of title on the one side, implying, therefore, that the act must be done of necessity under the influence of mistake; and undoubtedly it may be expected that the party should advertise the other that he is acting under a mistake." The learned judge is clearly right in this view of the doctrine; and the duty of compensation in such cases, at least to the extent of the permanent increase of value, is founded upon the constructive fraud, or gross negligence, or delusive confidence held out by the owner; for under such circumstances the maxim applies: *Qui tacet, consentire videtur*; *Qui potest, et debet vetare, jubet, si non vetat*.² Whether this doctrine is applicable to minors who stand by and make no objection, and disclose no adverse title, having a reasonable discretion from their age to understand

¹ 12 Ves. 84, 85.

² See 1 Story, Eq. Jur. §§ 388, 389, 390, 391; *Green v. Biddle*, 8 Wheat. 1, 77, 78; 1 Madd. Ch. 209, 210.

and to act upon the subject; and whether, if under guardianship, the guardian would be bound to disclose the title of his ward; and how far the latter would be bound by the silence or negligence of his guardian; and whether there is any just distinction between minors living within the State and minors living without the State, — these are questions of no inconsiderable delicacy and importance, upon which I should not incline to pass any absolute opinion in the present state of the cause, reserving them for further consideration, when all the facts shall appear upon the report of the Master. There are certainly cases in which infants themselves will be held responsible in courts of equity for their fraudulent concealments and misrepresentations whereby other innocent persons are injured.¹

The other question, as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex aequo et bono*, I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, *Nemo debet locupletari ex alterius incommodo*; or, as it is still more exactly expressed in the Digest, *Jure nature æquum est, neminem cum alterius detrimento et injuria fieri locupletiores*.² I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate; and thus to recoup them from the rents and profits.³ So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor for the amount of his meliorations and improvements of the estate, beneficial to the true owner.⁴ In each of these cases the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity.⁵ But it has been sup-

This is not a C. maxim.

¹ See 1 Story, Eq. Jur. § 385; 1 Fonbl. Eq. Jur. B. l. ch. 3, § 4; *Savage v. Foster*, 9 Brod. 35.

² Dig. lib. 50, tit. 17, l. 206.

³ 2 Story, Eq. Jur. §§ 799 a, 799 b, 1237, 1238, 1239; *Green v. Biddle*, 8 Wheat. 77, 78, 79, 80, 81.

⁴ See also 2 Story, Eq. Jur. § 799 b. and note; Id. §§ 1237, 1238.

⁵ *Ibid.*

posed that courts of equity do not, and ought not, to go further, and to grant active relief in favor of such a *bona fide* possessor making permanent meliorations and improvements, by sustaining a bill brought by him therefor against the true owner after he has recovered the premises at law. I find that Mr. Chancellor WALWORTH, in *Putnam v. Ritchie*,¹ entertained this opinion, admitting at the same time that he could find no case in England or America where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just that in such a case the true owner should recover and possess the whole without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is that the moment the house is built it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief?

I have ventured to suggest that the claim of the *bona fide* purchaser under such circumstances is founded in equity. I think it founded in the highest equity; and in this view of the matter I am supported by the positive dictates of the Roman law. The passage already cited shows it to be founded in the clearest natural equity. *Jure nature æquum est.* And the Roman law treats the claim of the true owner, without making any compensation under such circumstances, as a case of fraud or ill faith. *Certe, say the Institutes, illud constat; si in possessione constituto edificatore, soli Dominus potat domum suam esse, ne solvat pretium materie et mercedes fabricarum; posse cum per exceptionem doli mali repelli; utique si bonæ fidei possessor, qui edificaverit. Num scienti, alienum solum esse, potest objici culpa, quod edificaverit temere in eo solo, quod intelligebat alienum esse.*² It is a grave

¹ 6 Paige, 390, 403, 404, 405.

² Just. Inst. lib. 2, tit. 1, §§ 30, 32; 2 Story Eq. Jur. § 799, b.; Vinn. Com. ad Inst. lib. 2, tit. 1, § 30, n. 3, 4, pp. 194, 195.

mistake, sometimes made, that the Roman law merely confined its equity or remedial justice on this subject to a mere reduction from the amount of the rents and profits of the land.¹ The general doctrine is fully expounded and supported in the Digest, where it is applied, not to all expenditures upon the estate, but to such expenditures only as have enhanced the value of the estate (*quatenus pretiosior res facta est*),² and beyond what he has been reimbursed by the rents and profits.³ The like principle has been adopted into the law of the modern nations which have derived their jurisprudence from the Roman law; and it is especially recognized in France and enforced by Pothier, with his accustomed strong sense of equity, and general justice, and urgent reasoning.⁴ Indeed, some jurists, and among them Cujacius, insist, contrary to the Roman law, that even a *mala fide* possessor ought to have an allowance of all expenses which have enhanced the value of the estate, so far as the increased value exists.⁵

The law of Scotland has allowed the like recompense to *bona fide* possessors making valuable and permanent improvements; and some of the jurists of that country have extended the benefit to *mala fide* possessors to a limited extent.⁶ The law of Spain affords the like protection and recompense to *bona fide* possessors, as founded in natural justice and equity.⁷ Grotius, Puffendorf, and Rutherford all affirm the same doctrine, as founded in the truest principles *ex æquo et bono*.⁸

There is another broad principle of the Roman law which is applicable to the present case. It is, that where a *bona fide* possessor or purchaser of real estate pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner, seeking to recover the estate from him.⁹ Now, in the present case, it cannot be overlooked that the lands of the testator now in controversy, were sold for the payment of his just debts under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the prerequisites. It was not, therefore, in a

¹ See *Green v. Biddle*, 8 Wheat. 79, 80.

² Dig. lib. 20, tit. 1, l. 29, § 2; Dig. lib. 6, tit. 1, l. 65; Id. l. 38; Pothier Pand. lib. 6, tit. 1, n. 43, 44, 45, 46, 48.

³ Dig. lib. 6, tit. 1, l. 48.

⁴ Pothier De la Propriété, n. 343 to n. 353; Code Civil of France, art. 552, 555.

⁵ Pothier De la Propriété, n. 350; Vinn. ad Inst. lib. 2, tit. 1, l. 30, n. 4, p. 195.

⁶ Bell Comm. on Law of Scotland, p. 139, § 538; Ersk. Inst. b. 3, tit. 1, § 11; 1 Stair Inst. b. 1, tit. 8, § 6.

⁷ 1 Mor. & Carl. Partid. b. 3, tit. 25, l. 41, pp. 357, 358; Asa & Manuel, Inst. of Laws of Spain, 102.

⁸ Grotius, b. 2, ch. 10, §§ 1, 2, 3; Puffend. Law of Nat. & Nat. b. 4, ch. 7, § 61; Rutherford. Inst. b. 1, ch. 9, § 4, p. 7.

⁹ Dig. lib. 6, tit. 1, l. 65; Pothier Pand. lib. 6, tit. 1, n. 43; Pothier De la Propriété, n. 343.

just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (Boyd) have been relieved from a charge to which they were liable by law. So that he is now enjoying the lands free from a charge which, in conscience and equity, he and he only, and not the purchaser, ought to bear. To the extent of the charge from which he has been thus relieved by the purchaser, it seems to me that the plaintiff, claiming under the purchaser, is entitled to reimbursement in order to avoid a circuit of action to get back the money from the administrator and thus subject the lands to a new sale, or, at least, in his favor, in equity to the old charge. I confess myself to be unwilling to resort to such a circuit in order to do justice where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge to which they are *ex æquo et bono*, in the hands of the present defendant, clearly liable.

These considerations have been suggested because they greatly weigh in my own mind after repeated deliberations on the subject. They, however, will remain open for consideration upon the report of the Master, and do not positively require to be decided, until all the equities between the parties are brought by his report fully before the court. At present it is ordered to be referred to the Master to take an account of the enhanced value of the premises by the meliorations and improvements of the plaintiff, and those under whom he claims, after deducting all the rents and profits received by the plaintiff and those under whom he claims; and all other matters will be reserved for the consideration of the court upon the coming in of his report.¹

¹ Upon the coming in of the Master's report, the following opinion was delivered by Mr. Justice STORY:—

STORY, J. I have reflected a good deal upon the present subject; and the views expressed by me at the former hearing of this case, reported in 1 Story, 478, *et seq.*, remain unchanged; or rather, to express myself more accurately, have been thereby strengthened and confirmed. My judgment is that the plaintiff is entitled to the full value of all the improvements and meliorations which he has made upon the estate, to the extent of the additional value which they have conferred upon the land. It appears by the Master's report that the present value of the land with the improvements and meliorations is \$1000; and that the present value of the land without these improvements and meliorations is but \$25; so that in fact the value of the land is increased thereby \$975. This latter sum, in my judgment, the plaintiff is entitled to, as a lien and charge on the land in its present condition. I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice, for its foundation. The Betterment Acts (as they are commonly called) of the States of

66 entered into parol agreement with defendant under a parol agreement made with defendant and defendant refused to convey. Account of the same.

MATHEWS v. DAVIS.

IN THE SUPREME COURT OF TENNESSEE, DECEMBER TERM, 1845.

[Reported in 6 Humphrey, 324.]

THIS is an action of assumpsit which was brought by Davis against Mathews, in the Circuit Court of Robertson county.

The plaintiff declared for work and labor done and materials furnished, and proved on the trial, at the — term, 1845, MARTIN, J., presiding, that by verbal contract he had purchased of defendant one hundred acres of land, and had been placed in possession of the same; that with the knowledge and approbation of defendant he built a dwelling-house, smoke-house, kitchen, and made other valuable improvements on the land; that defendant witnessed the progress of those improvements from time to time, and acquiesced in the acts of plaintiff as rightful. When an attempt was made to run out the land, the plaintiff and defendant disagreed as to the lines, and defendant repudiated the contract and refused to convey.

The judge charged the jury that where one entered into possession of land under a parol agreement of purchase and makes improvements thereon, with the knowledge and approbation of the owner, and the owner refuses afterwards to make a conveyance in conformity with the parol contract, an action of assumpsit would lie against the owner of the land, for the value of the improvements thus made, and the criterion of damages would be not the increased value of the land to the owner, but the value of the improvements put upon it, deducting from the value of the improvements the value of the use of the land and improvements during the time the plaintiff occupied the same.

The jury found a verdict for the plaintiff. A motion for a new trial being made and overruled, and judgment rendered, the defendant appealed.

Boyd, for plaintiff in error.

One who enters upon a tract of land under a parol contract of purchase cannot sustain an action of assumpsit for the value of the improvements he may make upon it, because he makes the improvements for himself, not the owner of the land, and there is no contract for payment. *Nelson v. Allen & Harris*.¹

The improvements as soon as made vest in the owner of the land, and a

Massachusetts and Maine, and of some other States, are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate.

The report will, therefore, be accepted and allowed; and a decree made in conformity to the present opinion. — 2 *Story*, 698. [Ed.]

¹ 1 Yerg. 380; 10 Yerg. 477.

court of equity can make him pay their value if he has been guilty of fraud or acquiescence. *Herring & Bird v. Pollard*; 1 Story, 478, 495.¹

If entitled to recover at all, he should only be allowed the value of his improvements, so far as they augmented the property in value.²

Lowe, for defendant in error.

1. He contended that an action of assumpsit was an equitable action for the recovery of what *ex aequo et bono* was due: Bacon tit. Assumpsit; *Moses v. McFarlane*; ³ and that though there were no express promise to pay the value of the improvements, the law would imply a promise. The defendant in error went into possession by consent of plaintiff in error. He made the improvements with his approbation, and it was a fraud to attempt to get the value of defendant's labor without compensation. The true criterion of damages was the value of defendant's labor. The value of his labor will be the extent of his loss, and that loss is a consideration sufficient to support a contract or imply a promise as well as a gain to the plaintiff in error.⁴ If, however, he is not entitled to the value of what he has lost, he is entitled to what the other party has gained. "No one shall gain by another's loss."⁵ The defendant in error is entitled to recover to that extent by the first principles of natural equity.

2. He contended that a court of law was the proper forum for the recovery of damages. Whether the criterion of damages be the loss of the defendant in error, or the gain of plaintiff in error, the value of the erections or the value of the labor, a jury is more competent to judge of and determine the questions involved than a chancellor. It is the peculiar well-ascertained and most appropriate province of a jury to fix the value of labor and of agricultural erections and improvements. "They are supposed to be peculiarly well qualified by their experience of the conduct, affairs, and dealings of mankind and the manners and customs of society," for the determination of such questions of fact.⁶ "In this respect the law confides implicitly in their knowledge, experience, and discretion."

He contended, that if the defendant in error had any claim against the plaintiff in error, arising out of the subject-matter of this suit, it was a matter unfit for equitable jurisdiction and was only the proper subject for the determination of a jury.

He, therefore, claimed an affirmance of the judgment of the Circuit Court.

GREEN, J., delivered the opinion of the court.

This is an action of assumpsit for work and labor done, and for materials furnished.

On the trial, it appeared that Davis made a verbal contract with Mathews for the purchase of one hundred acres of land, and that he went on the land and put up some buildings for himself; but that when the parties

¹ 4 Humph.

² 2 Kent, 336.

³ 3 Burrow.

⁴ 3 Humph.

⁵ Kames' Principles of Equity.

⁶ 1 Starkie.

went to run out the land they disagreed as to the manner it was to be run out, and the contract was never reduced to writing. The plaintiff raised an account against the defendant for work done and materials furnished in the erection of these houses, and proved that the prices charged were reasonable.

The court charged, that a party making improvements on land, under a verbal contract for the purchase of it, was entitled to recover in this form of action the value of such improvements. charge

This is the first case that has come before us, where an attempt has been made to recover, in an action at law, for improvements made on land held by a contract void by the statute of frauds. Chancellor WALWORTH, of New York, denied relief in such a case, where the party sought it in equity. *Putnam v. Richie*.¹ But Mr. Justice STORY entertained a bill for improvements, in the case of *Bright v. Boyd*.² He said, "The denial of all compensation to such a *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, is contrary to the first principles of equity." Story

The case of *Bright v. Boyd* is the first, so far as we know, in which compensation has ever been given to a party seeking to make the true owner of the land liable. That case was followed by this court, in *Herring & Bird v. Pollard's executors*; ³ and relief was given for improvements that may have enhanced the value of the land, or, in the language of Judge STORY, such meliorations as have added to the permanent value of the estate.

This is as far as any court has ever gone; and, we think, as far as any principle of equity will justify. When a contract for land is entered into, the parties know it will not be binding unless it is made in writing. Each party is equally culpable for failing to make the contract in such manner as that it will be obligatory. If the party agreeing to purchase perform labor, and make improvements, which will benefit the owner of the land, we have said, he has an equitable right to compensation. But if his work and labor, and materials, are of a character that will not benefit the owner of the estate, upon what principle of equity can it be assumed that he ought to be paid? It matters not how much labor he has employed, nor what amount he may have expended for materials, if the estate is not benefited he has no claim to compensation from the owner of the land. To allow him to recover, in such a case, would be to reward him for volunteering his labor on another man's land, and to punish the owner of the soil for permitting him to do it. This cannot be done. His honor, the judge of the Circuit Court, erred, therefore, when he told the jury that the plaintiff was entitled to the value of his improvements, whether they enhanced the value of the estate or not. But this only demonstrates the impracticability of such investigations in a court of law. A jury cannot judge of ameliorations, and adjust the matter between the parties. Besides, if a recovery be had

¹ 6 Paige, 390.² 1 Story, 478.³ 4 Humph. 362.

in a court of law at all. it must be had for the work, labor, and materials, so much as they were worth, as his honor told the jury. But we have seen this is not the criterion of compensation, and, therefore, it is unfit for a court of law, and exclusively a matter to be adjusted in equity.

Reverse the judgment.

JOHN S. WILLIAMS, ADMINISTRATOR, ETC., APPELLANT, *v.* ROBERT M. GIBBES AND ANOTHER, EXECUTORS, ETC. ROBERT M. GIBBES AND ANOTHER, EXECUTORS, ETC., APPELLANTS, *v.* JOHN S. WILLIAMS, ADMINISTRATOR, ETC.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1857.

(*Reported in 20 Howard, 535.*)

THESE were cross appeals from the Circuit Court of the United States for the district of Maryland. In the report, the first case only will be mentioned; namely, that of Williams against Oliver's executors.

The case was formerly before the court, and is reported in 17 How. 239.

The facts are stated in the opinion of the court.

It was argued by Mr. *Davis*, Mr. *Dulaney*, and Mr. *Martin* for Williams, and by Mr. *Reverdy Johnson* and Mr. *Campbell* for Oliver's executors.

The decree was for \$9,686.33 in money, and \$19,215.95 in stock, instead of \$22,866.94 in money, and \$32,847.77 in stock, as claimed by the appellant.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Maryland.

A bill was filed in the court below by Williams, the present appellant, to recover of the defendants the proceeds of the share of complainant's intestate in what is known as the Baltimore Company, which had a claim against the Mexican government, that was awarded to it under the treaty of 1839. The proceeds of the share amounted to the sum of \$41,306.41. The history of the litigation to which the award under the treaty gave rise, in the distribution of the fund among the claimants or the assignees composing the Baltimore Company, will be found in the report of four of the cases which have heretofore come before this court.¹ That of *Williams v. Gibbs*, in 17 How., contains the report of the present case when formerly here. This court then decided that the claim of the executors of Oliver to the share of Williams was not well founded; that the interest of Williams in the same had not been legally divested during his lifetime; and that his legal representative then before the court was entitled to the

¹ 11 How. 529; 12 How. 111; 14 How. 619; 17 How. 233, 239.

proceeds. The decree of the court below was reversed, and the cause remanded for further proceedings, in conformity with the opinion of the court. Upon the cause coming down before that court on the mandate, the defendants, the executors of Oliver, set up several charges against the fund, which it was claimed should be received and allowed in abatement of the amount.

1. For certain costs and expenses to which they had been subjected in resisting suits instituted against it by third parties. The history of these suits will be found in the cases already referred to in this court, and need not be stated at large.

2. For services and expenses of Oliver in his lifetime, in the prosecution of the claim of the Baltimore Company, as its attorney and agent before the government of Mexico, from the year 1825 down to the time of his death in 1834.

The court below allowed to the executors the costs and expenses to which they had been subjected in defending the suits mentioned, and also thirty-five per cent of the fund in question for the services of Oliver.

The case is one in many of its features novel and peculiar.

James Williams, the intestate, and owner of the share in the Baltimore Company, became insolvent in 1819, and took the benefit of the insolvent laws of Maryland; and in 1825 the insolvent trustee of his estate sold and assigned to Robert Oliver the share in question in this company; and from thence down to the year 1849, Oliver in his lifetime, and his executors afterwards, did not doubt but that a perfect title to the share had passed by virtue of this assignment. In that year the Court of Appeals of Maryland decided, in a case between the executors and an insolvent trustee of Williams, that no title passed to Oliver by this assignment; and as a legal consequence it was held by this court, in 17 How., that the interest remained in Williams at his death, and of course passed to his legal representative, the complainant.

All the services and expenses, therefore, of Oliver, in his lifetime, in the prosecution of the claims of the Baltimore Company against the government of Mexico, and of the litigation since encountered by his executors in respect to the share, have resulted in securing the proceeds of the same to the estate of Williams, the original shareholder. Williams in his lifetime, and his legal representatives since, down till the fund was in court awaiting distribution, had taken no steps for its recovery, nor had they been subjected to any expense. The whole of the services had been rendered, and expenses borne, by Oliver and his executors; and the question is whether, upon any established principles of law or equity, the court below were right in taking into the account, in the settlement between the parties, these services and expenses. We are of opinion they were.

By the judgment of the Court of Appeals of Maryland, Oliver was at no time the true owner of this share; as, notwithstanding the assignment by

the insolvent trustee, it still remained in Williams. Oliver thereby became trustee instead of owner of the share and of the proceeds, as did also his executors; and they must be regarded as holding this relation to the fund from their first connection with it. In that character the executors have been made accountable to the estate of Williams, and have been responsible since the fund came into their possession for all proper care and management of the same. In defending these proceeds, therefore, against suits instituted by third parties to recover them out of the hands of the executors, they have done no more nor less than they were bound to do as the proper guardians of the fund, if they had known at the time the relation in which they stood to it, and that they were defending it for the benefit of the estate of Williams, and not for that of Oliver. The services rendered and expenses borne could not have been dispensed with, consistent with their duties as trustees.

But it is said that these suits were defended by the executors while claiming the fund in right of their testator, and hence for the supposed benefit of his estate; that the defence was not made in their character of trustees, and cannot, therefore, be regarded as a ground for charging the estate of Williams with the costs of the litigation.

The answer to this view is, that although in point of fact the defence was made under the supposition that the fund belonged to the estate of Oliver, yet in judgment of law it was made by them as trustees and not owners, as subsequently judicially ascertained; and as the costs and expenses were properly incurred in the protection and preservation of the fund, it is but just and equitable they should be made a charge upon it.

The misapprehension as to the right cannot change the beneficial character of the expense, when indispensable to its security.

The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned; and the expenses are properly chargeable in his accounts against the estate.¹

Another principle which we think applicable to this case is to be found in a class of cases where a *bona fide* purchaser for a valuable consideration, without notice, has enhanced the value of the property by permanent expenditures, and has been subsequently evicted by the true owner on account of some latent infirmity in the title. It is well settled, if the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditures to be made, upon the principle that he who seeks equity must first do equity.²

A kindred principle is also found in a class of cases where there has been a *bona fide* adverse possession of the property tacitly acquiesced in by

¹ 2 Story, Eq. Jur. § 1275.

² 2 Story, Eq. Jur. §§ 799, 7996; 6 Paige, 403, 404; 1 Story, 494, 495.

the true owner. The practice of a court of equity in such cases does not permit an account of rents and profits to be carried back beyond the filing of the bill.¹ This principle is applicable where the person in possession is a *bona fide* purchaser, and there has been some degree of remissness or negligence or inattention on the part of the true owner in the assertion of his rights.

Courts of equity, it would seem, do not grant active relief in favor of a *bona fide* purchaser making permanent meliorations and improvements by sustaining a bill brought by him against the true owner, after he has succeeded in recovering the property at law.² The Civil Law in this respect is more liberal, and provides a remedy in behalf of the purchaser, even beyond an abatement of the rents and profits for such expenditures as have enhanced the value of the estate (cases above), and indeed generally applies the principle in favor of any *bona fide* possessor of property who has in good faith expended his money for its preservation or amelioration; otherwise, it is said, the true owner appropriates unjustly the property of another to himself.³

Now in the case before us, Oliver in 1825 purchased this share in the Baltimore Company for the consideration of \$2000, its full value at the time. The purchase was made from the insolvent trustee of Williams, who all parties concerned believed had the power to sell and transfer the title. Williams, down till his death in 1836, set up no claim to it; nor did his representative after his death, till August, 1852, when this bill was filed. Oliver and his executors had been in the undisturbed possession, so far as respects any claim under the present right, for the period of twenty-seven years. And although it may be said in excuse for any remissness, and by way of avoiding the consequences of delay, that Williams and those representing him had no knowledge of the defect in the title till the decision of the Court of Appeals of Maryland, it may be equally said, on the other hand, that Oliver and his executors were alike ignorant of it, and had in good faith expended their time and money in recovering the claim against the government of Mexico, and afterwards in defending it against a long and expensive litigation.

It is difficult to present a stronger case for the protection of a *bona fide* purchaser from loss, who has expended time and money in enhancing the value of the subject of the purchase, or a case in which the principle more justly applies that where the true owner seeks the aid of a court of equity to enforce such a title, the court will administer that aid only when making compensation to the purchaser. We are therefore of opinion that the court below was right in allowing in the account the costs and fees paid to counsel by the executors in the defence of the suits.

¹ 8 Wheat. 78; 27 E. L. & Eq. 212; 7 Ves. 541; 1 Edw. Ch. 579.

² 6 Paige, 390, 403, 404, 405; 1 Story, 495; 8 Wheat. 81, 82.

³ Toullier, 3 B., tit. 4, c. 1, ss. 19, 20.

In respect to the thirty-five per cent allowed for the prosecution of the claim against the government of Mexico, it stands in principle upon the same footing as other services and expenses incurred in protecting and preserving the fund after possession was obtained. The amount of compensation depends upon the proofs in the case as to the value of the service, and which must in a good degree be governed by the usual and customary charges allowed for similar services and expenses. As this claim was prosecuted with others by Oliver when he supposed and believed that he was the owner, and that he was acting on his own behalf and not as trustee for Williams, the rate of compensation must rest upon all the facts and circumstances attending the service; there could have been no agreement as to the compensation. And for the same reason it cannot be expected that an account of the services and expenses was kept, so as to enable the court to arrive with exactness at the proper sum to be allowed, as might have been required if Oliver had been chargeable with notice of the trust. The proofs show that Oliver appointed agents to represent him at the government of Mexico as early as March, 1825, and that these agencies were continued from thence down till his death in 1834; and that during all this time he kept up an active correspondence with them and others, and with our ministers at Mexico, and with his own government, on the subject. The justice of these claims had been acknowledged by the government of Mexico as early as 1823-24, but no provision was made for their payment. They were regarded as of very little value, from the hopelessness of their recovery; and it is perhaps not too much to say, upon the evidence, that in the absence of the vigorous and efficient prosecution of them by Oliver, they would have been worthless. In the result, for the share in question, which was sold in 1825 for \$2000, there was realized from the government of Mexico, under the treaty of 1839, the sum of \$41,306.41. The estate of Williams has never expended a dollar towards recovering it, nor has Oliver ever received any compensation for his services. The amount may seem large, but we cannot say the court below was not warranted in allowing it, upon the proofs in the case of the great service rendered, and of the customary charges in similar cases.¹

Upon the whole, we are satisfied the decree of the court below was right, and ought to be affirmed.

Mr. Justice GRIER dissented.

¹ A portion of the opinion relating to questions of practice has been omitted. — Ed.

JAMES VAUGHAN v. ROBERT CRAVENS *et al.*

IN THE SUPREME COURT OF TENNESSEE, SEPTEMBER TERM, 1858.

[Reported in 1 Head, 108.]

THIS cause was tried in the Chancery Court at Harrison. A decree was rendered at the July term, 1858, for the defendants. VAN DYKE, Chancellor, presiding. The complainant appealed.

Hopkins for the complainant.

Burch for the defendants.

WRIGHT, J., delivered the opinion of the court.

The bill in this case is filed to recover from the defendants compensation for certain improvements, which the complainant alleges he made upon their lands under a lease which was void, because not in writing. The Chancellor dismissed his bill, and he has appealed to this court. The lands were used for mining purposes, in getting coal from certain ore beds.

The defendant, Cravens, owned one-sixteenth of the lands, as a tenant in common with the other defendants, who owned the residue. And it is very clear, from this record, that whatever contract complainant had was with Cravens, and did not bind his co-tenants. It is denied in the answers that there was any lease. And Cravens, the only defendant who knows anything on the subject, says the contract was at first only to make a certain road, for which complainant at once was paid in coal then dug by defendant, and received by complainant; and that complainant was allowed afterwards only to dig out of a certain pit, which defendant had opened, under which he, without authority and in defiance of defendant's wishes, went on and done the work at another place, for which he now asks compensation.

It is not very clear what the contract was, and the facts as to this matter we incline to think are with the defendants.

But be all these things as they may, the weight of the proof is, that the improvements made by complainant have not enhanced the value of the land; while on the other hand, he committed great waste in cutting timber, etc. Upon the entire record, complainant is entitled to no relief, and we affirm the Chancellor's decree.

P. M. RAINER v. P. M. HUDDLESTON.

IN THE SUPREME COURT OF TENNESSEE, APRIL 8, 1871.

[Reported in 4 Heiskell, 223.]

APPEAL from the decree of the Chancery Court at Purdy. JAS. W. DOHERTY, Ch., October Term, 1868.

McKinney for complainant.

J. F. Huddleston for defendant.

NICHOLSON, C. J., delivered the opinion of the court.

The question in this case arises upon the following facts, as they appear in the bill, answer, and proof:—

In November, 1860, Huddleston agreed to sell to Rainer a tract of land, in McNairy County, containing two hundred and ninety-seven acres, for \$1500; of which \$500 was to be paid when possession was given, on the 25th of December, 1860, and the balance in one and two years. It was a parol contract, but bond for title was to be executed upon the payment of the \$500. Rainer took possession on the 25th of December, 1860, but failed to pay the \$500. In April, 1861, Rainer proposed to Huddleston that the contract should be reduced to writing; to this, Huddleston replied, that he did not consider it a trade unless he had paid the \$500 down, which was to have been paid on the 25th December, 1860. Huddleston further said to Rainer, that he had told him, when they traded, that if he thought he could not pay the \$500, he had better not strike a lick on the place towards improving it, for he would not pay him five cents for improving the place; but as he had moved on the place and made some improvements, if he would pay him \$1,000 by the next Christmas, with interest for twelve months, he would still give him a chance for the place, and would then give him a bond for title when the remaining \$500 was paid. Rainer continued in possession until late in the year 1863, when he abandoned the place and moved to Illinois, where he remained for about three years. Whilst he was in possession, he built several houses, cleared some land, and fenced the place. After Rainer moved away, Huddleston took possession of the place and was holding it by his tenant, when Rainer returned and demanded to be let into possession; and upon failing to get possession, he filed his bill for compensation for the permanent improvements made by him. There is no allegation in his bill that he had paid any portion of the purchase-money, nor does he deny but that the defendant had good title to the land, and was ready to comply with his portion of the contract.

These facts raise the question, whether a vendee of land by parol, who

has failed to comply with his contract of purchase, and has paid no part of the consideration, but has continued in possession and made permanent improvements, with notice that the vendor was opposed to the improvements being made, can hold the vendor, who has taken possession, responsible for the enhancement of the value of the land by reason of the improvements?

By the English law and the common law of this State, the owner recovers his land by ejectment, without being subjected to the condition of paying for the improvements which may have been made upon the land. The improvements are considered as annexed to the freehold, and pass with the recovery. Every possessor makes such improvements at his peril.¹

A different rule, however, has obtained in courts of chancery. It is well settled that when a bona fide possessor of land has made improvements thereon, and the owner comes into a court of equity for an account of the rents and profits, the defendant will be allowed to deduct therefrom the full amount of all ameliorations and improvements which he has beneficially made upon the estate.²

Since the case of *Herring & Bird v. Pollard*,³ courts of chancery in our State have entertained bills, and given relief to parol vendees of land who have been *bona fide* in possession and have made improvements that added permanent value to an estate. In laying down this rule, in the case of *Herring & Bird v. Pollard*, our court followed and adopted the reasoning of Justice STORY, in the case of *Bright v. Boyd*,⁴ in which Judge STORY said: "It appears to me, speaking with deference to other opinions, that the denial of compensation to such a *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his ameliorations and improvements, is contrary to the first principles of equity. To me it seems manifestly unjust and inequitable to appropriate to one man the property and money of another who is in no default."

In the case of *Matthews v. Davis*,⁵ Judge GREENE said, that the case of *Bright v. Boyd* was the first in which compensation had ever been given to a party seeking to make the true owner of the land liable. He adds: "This is as far as any court has ever gone; and, we think, as far as any principle of equity will justify."

In the case of *Rhea v. Allison*,⁶ Judge WRIGHT states the rule with more fulness and precision than it was stated in either of the other cases referred to. He says: "It is settled, in this State, that where a man is put in possession of land by the owner, upon an invalid or verbal sale, which the owner fails or refuses to complete, and in the expectation of the performance of the contract makes improvements, a court of equity will directly and actively, by a bill filed by him against the owner for an account, make him compensation to the full value of all his improvements, to the extent

¹ 2 Kent, 335.² 2 Story, Eq. Jur. § 799.³ 4 Humph. 362.⁴ 1 Story, 478.⁵ 6 Humph. 324.⁶ 3 Head, 176.

they have enhanced the value of the land, deducting rents and profits, and will treat the land as subject to a lien therefor."

It follows from the several authorities referred to, that complainant, who comes into a court of equity and claims compensation for improvements made on the land of another, will be repelled, unless he shows that he was a bona fide possessor, holding under an invalid or verbal sale, and honestly believing that he has, or will have, a valid title, and intending honestly to consummate his purchase by the payment of the purchase-money, and while so holding, makes improvements which add to the permanent value of the land, but fails to consummate his purchase, without fault on his part, and on account of the default of the vendor. Before he can successfully invoke the aid of a chancellor, it is incumbent on him to show that he has been in no default in not executing his contract, but that he has been prevented from so doing by the failure or refusal of the owner of the land to complete the sale.

It is manifest that in the case at bar the complainant has failed to bring himself within the rule laid down. By the terms of his contract he was to have paid \$500 when he got possession; in this he violated his contract. After being in possession a few months, he was distinctly notified by the owner of the land, that by his failure to pay the cash payment he considered the trade terminated; but he consented to extend the time to the end of the year, at which time complainant might pay \$1,000, and have the benefit of the trade. He continued in possession, but failed to make the payment at the end of the year. After his second default he still continued in possession for nearly two years, the owner of the land having no remedy against him, on account of the suspension of courts by the prevalence of the war. Whilst the complainant was so in default, and with a full knowledge that the defendant considered the trade at an end, and that he desired no new improvements to be made on his land, the complainant removed the old improvements on the place, and replaced them by others; and then at the end of nearly three years, as he alleges in his bill, he was forced to leave the premises on account of the condition of the country, resulting from the late war; and after remaining in another State until February, 1866, he returned and claimed compensation for his improvements. During all this time the defendant was in no default, but was ready and willing to complete the trade according to his contract. Under such circumstances, even if the improvements made had been shown clearly to have enhanced the value of the land, about which the proof is conflicting and unsatisfactory, we hold that the complainant has wholly failed to entitle himself to the relief prayed for.

The decree below is reversed, and the bill dismissed with costs.

PAUL MASSON v. H. W. SWAN, ADM'X, *et al.*

IN THE SUPREME COURT OF TENNESSEE, OCTOBER 21, 1871.

[*Reported in 6 Heiskell, 450.*]

APPEAL from the decree of the Chancery Court, July term, 1861. SETH J. W. LUCKEY, Ch.

Jas. R. Cocke for complainant.

George Andrews for the heirs.

NICHOLSON, C. J., delivered the opinion of the court.

In May, 1857, Wm. Swan agreed to sell to Paul Masson a vacant lot in Knoxville, for \$600. The agreement was in parol, no note given for the purchase-money, and no time fixed for its payment, and no written memorandum of the terms of sale. Masson took possession of the lot, and proceeded to make permanent improvements upon it by erecting buildings thereon for a residence. From the 25th of December, 1857, to the 25th of December, 1860, he occupied the premises as a residence. No payment on the purchase-money was made, and no application to Swan for a title. Swan died in March, 1859.

The bill was filed May 2, 1860, making no tender of purchase-money, and asking for no execution of the contract by title from the heirs of Swan, but assuming that the contract was void because not reduced to writing, and claiming compensation for the permanent improvements to the amount of the enhanced value of the property, setting off against such the rents, after deducting the amounts paid for taxes and insurance.

The widow of Wm. Swan, as his administratrix, and his heirs, were made defendants. The heirs answered, those who were adults answering for themselves, and those who were minors by their regular guardian, the service of process on them being waived by him.

By reference to the Clerk and Master the amount of the enhanced value of the lot was ascertained, to which was added the amount of taxes and insurance paid, and from the aggregate sum the amount of the rents was deducted. For the balance a decree was rendered, and an order of sale of the lot for its satisfaction.

Both sides have appealed.

1. It is objected to the decree below that the record shows that the minor defendants were not served with process, and that it does not appear that the answer put in for them by their regular guardian was subscribed and sworn to. The certificate of the clerk shows that the defendants made oath to the answer; this was sufficient without the signature of the party, as no exception was taken to it. The case of *Cowan v. Anderson*,¹

¹ 7 Col. 284.

determines that a regular guardian may defend for minors and waive process.

2. It is said that there is no equity in the bill, and that complainant has no right to the aid of a court of equity to enable him to rescind the contract.

By the recent decisions in this State, the contract of sale was not absolutely void, but voidable upon the election of either party. *Roberts v. Francis*.¹ Swan, the vendor, did not elect to avoid the contract, nor did his heirs after his death. Complainant made no tender of the purchase-money, and could not claim a title until he had done so. He rested upon the parol contract, made the improvements, and occupied the property as his own under the parol contract, until May 2, 1860, when he elected to avoid the contract and claim compensation for his improvements. He had the right to make his election, and as the improvements were made under a subsisting parol contract, he had the right to come into a court of equity to have his claim for compensation enforced. The equity springs from the fact that the contract is not void but voidable, and that either party has the right to avoid it. *Rhea v. Allison*.²

3. The equity of complainant is the amount of the enhancement of the value of the lot in market, resulting from the permanent improvements made upon it; this value to be estimated at the time he made his election to avoid the contract. The amounts actually expended in making or superintending the improvements do not furnish the criteria for ascertaining the enhanced value, though they may be looked to as legitimate evidence in the investigation.

But as complainant seeks the enforcement of an equity, he is bound to do equity; hence, he is required to account for the benefits derived from the use and occupation of the property. As he elects to repudiate the contract, and along with it the payment of the purchase-money, equity requires him to account for reasonable rents.

During the occupation of the lot the law imposed taxes on the property. These were incumbrances, for the removal of which he ought to have credit upon the amount of the rents. But the insurance paid upon the property stands on a different footing. He insured the property voluntarily and for his own protection, and while he was holding and treating the property as his own. We see no equity in allowing him a credit for this expenditure. The balance due to complainant will bear interest from the filing of the bill.

The only remaining question is as to whether the enhanced value should be paid by the administrator or the heirs? It cannot be regarded as a debt against the administrator. The liability arose upon the election of complainant to avoid the contract, and it is a liability arising out of no default on the part of the intestate or his administratrix. For all we can see, the intestate was ready at any time to make title if complainant had entitled himself to it by tendering or paying the purchase-money. Not

¹ 2 Heisk. 125.

² 3 Head, 176.

electing to do this during the lifetime of the intestate, and only making his election to avoid the contract after the legal title had descended to the heirs of the intestate, at which time his equitable claim for compensation came into existence, we think it clear that the liability attaches to the property itself out of which it sprung, and that it cannot be viewed as a debt of the estate to be paid by the administratrix. The real estate and not the personal is benefited by the improvement, and equity necessarily fixes the liability for the benefit on the real estate. || x

With the modifications indicated, the decree of the Chancellor is affirmed. The heirs will have four months within which to pay the amount ascertained to be due. The clerk of this court will make report of the amount due to the present term. The costs will be paid by complainant.

SMITH AND OTHERS v. DRAKE AND OTHERS.

IN THE COURT OF CHANCERY OF NEW JERSEY, FEBRUARY TERM, 1873.

[Reported in 8 C. E. Green, 302.]

ARGUED upon final hearing, on bill, answer, and proofs.

Mr. Kays and Mr. R. Hamilton for complainants.

Mr. McCarter for defendants.

THE CHANCELLOR. The complainants are five children of Alexander H. Smith, who died intestate in November, 1843. The defendant, Nathan Drake, was appointed administrator of his estate, and having obtained an order of the Orphans' Court of Sussex county for the sale of the real estate of his intestate for payment of debts, in March, 1846, sold the real estate, being a house and lot in Newton, to one Dennis Cochran, at public auction, for \$1300. On the 28th of January, 1847, he conveyed this property to Cochran by deed of that date, and on the same day received a deed from Cochran and wife for the same. Both deeds were dated and acknowledged on the same day, and acknowledged before the same Master.

Nathan Drake took possession of the property after the sale, put buildings in repair, added to them, and erected new buildings on the lot, and rented them and received the rents.

In 1843, at the death of their father, the oldest of the complainants was sixteen, the youngest four years old. The first was therefore of age in 1848, the last in 1860. The bill was filed in 1865, or five years after the youngest child came of age.

The complainants allege that the sale made nominally to Dennis Cochran was in reality made to Drake himself, for whom Cochran was the agent. They asked to have the sale set aside on equitable terms, and the property conveyed to them.

Drake, in answer, denies that Cochran purchased for him, or that he was the real purchaser at the sale; and sets up the acquiescence of the complainants, and the time permitted to elapse before filing the bill, as a bar to the relief in equity.¹

The complainants ask that the conveyance be set aside on equitable terms. On part of the defendant it is contended that the court should only allow the excess of the value at the time of the sale, above the bid of Cochran, with interest; as was done in the case of *Huston v. Cassedy*.² In that case this course must be taken to have been pursued by the Chancellor for the reason that it was with the assent of the complainants, as it was really the most beneficial to them; he states his determination to make the reference in that manner with the reservation, "unless the complainants show cause to the contrary." He states that "the rule is inflexible, that a sale made by an administrator or any other acting in a fiduciary capacity to himself, or for his benefit, will be held void at the instance of the party prejudiced by such sale, and the purchaser regarded in equity as a trustee." And in *Obert v. Obert*,³ to which he there refers, he said: "It is a matter of right in the complainant, and not of discretion in the court, to have the deed removed out of his way and set aside." These are perfectly consistent with the course pursued, if assented to by the complainant; but not with refusing to set aside the deed when the complainant insists upon it. In that case it is pretty clear from the evidence, that the property would not have brought \$6000 at that time, and, therefore, the decree, while just against the defendant, was most beneficial to the complainant. The defendant here, as there, has been guilty of a legal or constructive breach of trust, and therefore must be held to strict account; and the option in such case is always with the *cestui que trust*.

But the decree must be made on equitable terms. The defendant paid debts of his intestate to the amount of the sum bid for the property. He must be allowed that sum with interest from the times when he paid it out, which, for the purpose of this case, must be assumed to be the date of the delivery of the deed. His final account was no doubt adjusted on that basis.

He also expended moneys in the improvement of the premises. He must be allowed the additional value which such improvements at the present time give to the premises, above what their value would have been now if these improvements had not been made. He is not to be allowed the cost of such improvements; they may have been unwisely made, or their value have perished or depreciated by decay. But such allowance must not, in any case, exceed the cost of these improvements, for the defendant must make no profit out of them.

¹ So much of the opinion as relates to the questions raised by defendant's answer has been omitted. — Ed.

² 2 Beas. 228, and 1 McCarter, 320.

³ 2 Stockt. 103.

He must account for all rents and profits received from the premises, or that might have been received by prudent management and ordinary diligence, including a fair and full occupation rent for the same when occupied by him or his family; and is to be credited for taxes actually paid, and all ordinary and usual repairs.

Harriet Smith, the widow of the intestate, was entitled to dower in the premises. On the 2d day of April, 1850, she conveyed this right to Drake. From that time until her death, Drake, by this deed, was entitled to one third of the income, and therefore, during that period, must be charged with only two thirds of the net value or income of the property.

If the occupation rent, and rents received from the property as improved, exceed the rents that could have been received from it as it was at the sale, kept in good repair, any excess in the actual cost of improvements above their present value to the property may be deducted from such excess of rents, and the defendant be charged with the balance only; as it is equitable that expenditures which gave additional temporary value to the premises should be repaid out of the additional income actually received by means of them.

Upon payment of the amount found due on these principles to the legal representatives of Nathan Drake, who is now dead, the conveyance to him will be declared void.

HAGGERTY v. McCANNA.

IN THE COURT OF CHANCERY OF NEW JERSEY, MAY TERM, 1874.

[Reported in 10 C. E. Green, 48.]

ON final hearing on pleadings and proofs.

Mr. *James Wilson* for complainant.

Mr. *Mercer Beasley, Jr.*, for defendant.

The CHANCELLOR. In 1864, the complainant married Jane McCanna, then the widow of John McCanna, deceased. She had one child, the defendant, the issue of her marriage with McCanna. The defendant was about eleven years old when her mother was married to the complainant. Her father died seized of two vacant lots in Trenton, then of comparatively small value. After his death, his widow built, at the cost of about \$500, a small house on one of the lots and resided in it. After her marriage to the complainant, the latter built another house on the front of the same lot, and a house on the other lot. He improved the lots in various other ways, by grading, flagging the sidewalks, etc. He and his wife dwelt in one of these houses and rented out the other. He paid the taxes and assessments on the property. From the time of his marriage to this time, he

has been in possession of it. His wife had dower in it, but it was never assigned. When the buildings and other improvements above referred to were put on the property, both the complainant and his wife supposed that the land belonged to the latter, and they first learned their mistake when she, being as she supposed *in extremis*, in September, 1871, called in a lawyer to make her will. She died in September, 1872, leaving three children, the defendant and two other daughters, the issue of her marriage with the complainant, both of whom are still living. When McCanna bought the property, it was subject to a mortgage for \$300, the amount of which was allowed him as so much of the purchase-money. The mortgage was subsequently assigned to his brother, who, in 1867, required payment, and the complainant then, with his own money, paid it, sending to the holder of it in Ireland a draft for the amount then due on it, \$487, and received it in return with the bond it was given to secure. This mortgage the complainant, in the full belief that the property was his wife's, subsequently, when he was about to mortgage the property to secure a loan, caused to be cancelled of record. The defendant lived in the complainant's family from the time of his marriage to her mother up to March, 1871, when she was sent to a school in Newark. The complainant, however, appears not to have supported her at that school. Very soon after the death of the complainant's wife, the defendant instituted an action of ejectment against the complainant, in the Supreme Court, to obtain possession of the premises. The complainant then filed his bill to restrain her from prosecuting that suit, and praying that the value of the improvements and the value of the land irrespective of them, might be ascertained, and the defendant might be required to pay him for his improvements and the amount of the mortgage debt paid by him, or release the land to him on receiving the value thereof over and above the improvements, after deducting therefrom the mortgage debt above referred to, and a proper allowance for her support while she lived in his family.

This case is one of great hardship. The improvements are proved to be of the present value of more than \$2000. They were all made by the complainant, except the small house before mentioned built by his wife during her widowhood. Against the value of these improvements, and the payments made on account of the property by the complainant, there is no offset except the value of the use and occupation of the lots, which, undoubtedly, is comparatively very insignificant. The result of the suit at law must be to deprive the complainant of his entire property. He invokes the aid of this court to prevent so flagrant a wrong. He bases his claim to relief on the ground of mistake. But an error which is the result of inexcusable negligence is not a mistake from the consequences of which equity will grant relief. The complainant's mistake in this case was in assuming, as he says he did, from the fact that his wife had administered on McCanna's estate, that she was the owner of the lots of land in question.

He appears to have made no inquiry whatever on the subject. On the argument it was urged that on the ruling of this court in *McKelway v. Armour*,¹ the relief sought might be granted. But the decision in that case was expressly put on the ground of the complainant's mistake as to the location of a vacant lot, plotted out on a map only, a mistake which the court said was one which might occur to the most careful and diligent man, and the fact that the defendant stood by and participated in the mistake, which latter consideration was regarded as a most important feature in the case. In the present case the defendant, during all the time during which the improvements were made, was an infant, and incapable, therefore, of either the participation or the acquiescence which were so essential elements in that case. Besides, the mistake here was one from which the most ordinary care would have guarded the complainant. No relief can be afforded him on the ground of mistake. Nor can he avail himself of the position taken by his counsel on the hearing, that his wife may be considered as having been in possession of the premises as guardian of the defendant, and as having made the improvements as such guardian, and that therefore the complainant is, in equity, entitled to have from the defendant the value of those improvements. A guardian will not be allowed the cost, or even the value of the buildings erected on the estate of the ward without authority. *Putnam v. Ritchie*;² *Hassard v. Rowe*;³ *Green v. Winter*;⁴ *Bellinger v. Shafer*;⁵ *Payne v. Stone*.⁶ The complainant's counsel insisted upon the hearing that, under the circumstances, the court would, to relieve the complainant in part at least, grant him an allowance for past maintenance of the defendant. That the support which the complainant gave her was given without expectation of compensation, is manifest from the evidence. He appears to have voluntarily assumed the care and support of his step-daughter. He therefore stood towards her *in loco parentis*. In the absence of an express promise, made by the child after attaining majority, to repay the step-father, no compensation can be recovered by him at law or in equity for such support. *Chitty on Con.*, 11 Am. Ed. 215; *Cooper v. Martin*;⁷ *Shark v. Cropsey*;⁸ *Williams v. Hutchinson*;⁹ *Lantz v. Frey*;¹⁰ *Worthington v. McCraer*;¹¹ *Grove v. Price*;¹² *Schouler on Dom. Rel.* 378.

I do not feel at liberty, even for so conscientious a purpose as to mitigate the unquestionable hardship of the complainant's case, to create a liability where no legal or equitable foundation for it exists. The case in 26 Beavan is in point. There the step-father's estate was chargeable with certain trust money received by him, the property of the step-children. His executor sought to offset it by a claim in favor of the step-father for the

¹ 2 Stockt. 115.² 6 Paige, 390.³ 11 Barb. 24.⁴ 1 Johns. Ch. 26.⁵ 2 Sandf. Ch. 293.⁶ 7 Sm. & M. 367.⁷ 4 East, 76.⁸ 11 Barb. 224.⁹ 3 Comst. 312.¹⁰ 19 Pa. 366.¹¹ 23 Beav. 81.¹² 26 Beav. 103.

maintenance of the children. The Master of the Rolls, Sir JOHN ROMILLY, refused to allow it.

I am constrained to refuse the relief the complainant asks, on this ground also. The money paid in satisfaction of the mortgage, however, with lawful interest from the time when it was paid by the complainant, should be declared to be an equitable lien on the land, and should be charged thereon accordingly. The taxes, etc., paid by the complainant in respect of the property, and the improvements made by him thereon, are enough to answer any just demand of the defendant for rents and profits. In any account of these rents and profits between her and the complainant, she would be in equity entitled to only two thirds thereof during the lifetime of her mother, whose dower in the premises was never assigned. The complainant is entitled, also, to his costs of this suit. I shall therefore charge upon the land the amount paid in satisfaction of the mortgage, with interest from the time when it was paid, and on payment thereof to the complainant, with his costs of this suit, the injunction will be dissolved. This case would present a different aspect as to the relief which the court could afford in the premises, were the defendant, instead of the complainant, an applicant for the exercise of equitable power. In such case, the court might extend its assistance to her on terms, or refuse its aid altogether, according as equity might seem to demand.

JOHN GUTHRIE v. THOMAS HOLT.

IN THE SUPREME COURT OF TENNESSEE, DECEMBER TERM, 1876.

[*Reported in 9 Baxter, 527.*]

APPEAL from the Circuit Court at Nashville. NATHANIEL BAXTER, J., presiding.

F. E. Williams for plaintiff.

Baxter Smith for defendant.

DEADERICK, C. J., delivered the opinion of the court.

Holt obtained judgment in the Circuit Court of Davidson county against Guthrie, from which Guthrie appealed to this court. In January, 1871, Holt sold to Guthrie by verbal contract a tract of land in said county, agreeing to make him a deed when the boundaries should be ascertained. Holt put his son-in-law in immediate possession. Within the year Guthrie stated his inability to pay for the land, and proposed to rescind the trade and pay for the use. This was not done, and Holt assumed possession, and sued him for rent for use and occupation.

The defences set up were, that Lovell, the son-in-law of Guthrie, was the purchaser and not Guthrie, and that he had made improvements on the

land exceeding in value the rents. The jury found, on sufficient evidence, that Guthrie was the purchaser, and, under the charge of the court, they made no allowance for any improvements, but gave a verdict for \$150 for one year's rent, of which plaintiff remitted \$25.

The court charged the jury that if Holt was in fault in not completing the contract of sale, Guthrie would be entitled, upon plea of set-off, to so much as his improvements enhanced the value of the lands, but if Holt was ready to carry out the contract and Guthrie refused, then he would not be entitled to any allowance for improvements. It is insisted by plaintiff in error that the entire part of this charge is erroneous, and that Guthrie or Lovell having purchased in good faith, and no deed having been executed, he is entitled, upon the repudiation of the contract by either party, to be allowed for improvements to the extent such improvements may have enhanced the value of the land.

The case of *Humphreys v. Hottlinger*,¹ is cited as sustaining the position contended for. In that case Humphreys was in possession under a title bond, which stipulated that if the contract was not met in twelve months after it is due, the same is subject to be reversed at the will of Hottlinger. The purchase not having been paid for twelve months after it was due, Hottlinger elected to annul the contract and took possession of the property.

Humphreys filed his bill to obtain payment for his improvements. This court held, citing several cases, that the complainant was in possession lawfully by contract, and expected to pay for the lot, but was unable to do so, and, upon rescission, was entitled to be paid whatever sum his improvement enhanced the value of the lot, but no more. One of the cases cited is *Herring & Bird v. Pollard*,² where the purchasers filed their bill to obtain restitution of sums paid upon a verbal contract of purchaser of land, and for compensation for improvements made thereon, upon their failure to agree with the vendor upon the character of the conveyance to be made, and the court said the question is whether a party who has made improvements upon the land of another, expecting to obtain the title, is entitled to payment and can enforce it in equity; and adopting the opinion of Judge Story, in 1 Story's Rep., 478, that the denial of all compensation to such *bona fide* purchaser in such a case, where he had enhanced the permanent value of the estate, would be contrary to the first principles of equity, adding that to me it seems manifestly unjust and inequitable thus to appropriate to one man the property of another, who is in no default. In this last mentioned case, as in the case in 3 Sneed, relief was sought in equity by the vendee. In 6 Humph. 324, it was held that a vendee in possession under a verbal contract of purchase of land, could not recover at law for improvements, although he might do so in equity to the extent that such improvement has enhanced the value of the land.

¹ 3 Sneed, 228.

² 4 Humph. 362.

And in 3 Head, 178, it was held as settled in this State that when a man is put in possession of land by the owner upon a verbal sale, or one otherwise invalid, which the owner of the land fails or refuses to complete, and, in expectation of the performance of the contract, the vendee makes improvements, he may recover, upon bill filed by him, the value of such improvements to the extent they have enhanced the value of the land, citing 4 Humph. and 3 Sneed cases. In the later case of *Rainer v. Huddleston*,¹ where there was a verbal sale with a promise by the vendee to pay \$500 on taking possession, and the vendor then to give a bond for title, Rainer, the vendee, took possession but did not pay any part of the purchase-money, and Huddleston refused to make him a title bond, but told him he would give him further time until the next Christmas to pay what was due then by the terms of their contract. Rainer continued in possession, paid no part of the purchase-money, and, after it was all due, abandoned the place and sued in chancery for the value of his improvements.

It further appeared that at the time of the sale the vendor notified the vendee not to improve the land, if he failed to pay the \$500 first due, as he would not allow anything for improvements.

NICHOLSON, C. J., in delivering the opinion of the court, referring to and citing the several cases decided by this court and other authorities upon this question, says:—

“It follows, from the several authorities referred to, that complainant who comes into a court and claims compensation for improvements made upon the land of another, will be repelled unless he shows that he was a *bona fide* possessor holding under an invalid or verbal sale, and honestly believing that he has or will have a valid title, and intending honestly to consummate his purchase by the payment of the purchase-money, and, while so holding, makes improvements which add to the permanent value of the land, but fails to consummate his purchase without fault on his part, and on account of the default of the vendor. Before he can successfully invoke the aid of a chancellor, it is incumbent on him to show that he has been in no default in not executing his contract, but has been prevented from so doing by the failure or refusal of the owner of the land to complete the sale.”

Although it appears that the vendor had notified the vendee that he would not pay for improvements, the case is distinctly put upon the ground that the vendor was guilty of no fault, as by refusing to complete the sale or otherwise, but that the vendee was in default by his failure to perform his contract, and upon this ground, which is stated by the learned judge to be the rule deduced from the authorities cited, relief was refused, and we think the rule a sound one.

The case in Story's Rep., which was followed by the case in 4 Humph., assumed that the vendee was in no default and upon that ground was enti-

¹ 4 Heisk. 224.

tled to relief, and our own cases grant the relief upon the same idea, that the vendor either fails or refuses to complete the sale, or that by reason of an honest disagreement as to its terms, neither is willing to its execution upon the terms insisted upon by the other. In the case of *Humphreys v. Hottlinger*,¹ the learned judge who delivered the opinion, after citing the previously decided cases by the court, already referred to, states that the case, although differing in its facts, falls within the principle settled in the cases cited.

If it is assumed that the vendor was in fault then the case would fall within the principle of those cases. But the vendor was ready to perform the contract, and the vendee failed or refused to perform his contract, and the vendor for this had the legal right to treat the sale as invalid and one which the vendee had refused and failed to execute and complete. Under the rule laid down in *4 Heisk.*, as deduced from the cases cited, the vendee would not be entitled to compensation for improvements. L

We do not think that there was any error in allowing evidence to show what the place produced in 1873, which could have prejudiced defendant.

There was much evidence as to the value of the rent, and whatever tended to show the productiveness of the land would be relevant. Nor was there anything in affidavits introduced for a new trial. The facts deposited to were considered leading points on the trial, and evidence adduced thereto by each party. Upon the whole we think there is no material error in the record and the judgment is affirmed.

THE ISLE ROYALE MINING COMPANY v. JOHN HERTIN
AND MICHAEL HERTIN.

IN THE SUPREME COURT OF MICHIGAN, OCTOBER 16, 1877.

[Reported in 37 Michigan Reports, 332.]

TROVER and *indebitatus assumpsit*. The facts are in the opinion.

T. L. Chadbourne and *S. F. Seager* for plaintiff in error.

Chandler & Grant and *G. V. N. Lothrop* for defendant in error.

COOLEY, C. J. The parties to this suit were owners of adjoining tracts of timbered lands. In the winter of 1873-74 defendants in error, who were plaintiffs in the court below, in consequence of a mistake respecting the actual location, went upon the lands of the mining company and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the wood was taken possession of by the mining company, and disposed of for its own purposes. The wood on the bank of the lake was worth \$2.87½ per cord, and the value of the labor expended

¹ 3 Sneed, 228.

by plaintiffs in cutting and placing it there was \$1.87½ per cord. It was not clearly shown that the mining company had knowledge of the cutting and hauling by the plaintiffs while it was in progress. After the mining company had taken possession of the wood, plaintiffs brought this suit. The declaration contains two special counts, the first of which appears to be a count in trover for the conversion of the wood. The second is as follows : —

“And for that whereas also, the said plaintiff, Michael Hertin, was in the year 1874 and 1875, the owner in fee simple of certain lands in said county of Houghton, adjoining the lands of the said defendant, and the said plaintiffs were, during the years last aforesaid, engaged as co-partners in cutting, hauling, and selling wood from said lands of said Michael Hertin, and by mistake entered upon the lands of the said defendant, which lands adjoined the lands of the said plaintiff, Michael Hertin, and under the belief that said lands were the lands of the said plaintiff, Michael Hertin, cut and carried away therefrom a large amount of wood, to wit : one thousand cords, and piled the same upon the shore of Portage Lake, in said county of Houghton, and incurred great expense, and paid, laid out, and expended a large amount of money in and about cutting and splitting, hauling and piling said wood, to wit : the sum of two thousand dollars ; and afterwards, to wit : on the first day of June, A. D. 1875, in the county of Houghton aforesaid, the said defendant, with force and arms, and without any notice to or consent of said plaintiffs, seized the said wood and took the same from their possession and kept, used, and disposed of the same for its own use and purposes ; and the said plaintiffs aver that the labor so as aforesaid done and performed by them, and the expense so as aforesaid incurred, laid out, and expended by them in cutting, splitting, hauling, and piling said wood, amounting as aforesaid to the value of two thousand dollars, increased the value of said wood ten times and constituted the chief value thereof, by reason whereof the said defendant then and there became liable to pay to the said plaintiff, the value of the labor so as aforesaid expended by them upon said wood and the expense so as aforesaid incurred, laid out, and expended by them in cutting, splitting, hauling, and piling said wood, to wit : the said sum of two thousand dollars : and being so liable, the said defendant in consideration thereof, afterwards, to wit : on the same day and year last aforesaid and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay unto the said plaintiffs the said sum of two thousand dollars, and the interest thereon.” —

The circuit judge instructed the jury as follows :

“If you find that the plaintiffs cut the wood from defendant's land by mistake and without any wilful negligence or wrong, I then charge you that the plaintiffs are entitled to recover from the defendant the reasonable cost of cutting, hauling, and piling the same.” This presents the only question

it is necessary to consider on this record. The jury returned a verdict for the plaintiffs.

Some facts appear by the record which might perhaps have warranted the circuit judge in submitting to the jury the question whether the proper authorities of the mining company were not aware that the wood was being cut by the plaintiffs under an honest mistake as to their rights, and were not placed by that knowledge under obligation to notify the plaintiffs of their error. But as the case was put to the jury, the question presented by the record is a narrow question of law, which may be stated as follows: whether, where one in an honest mistake regarding his rights in good faith performs labor on the property of another, the benefit of which is appropriated by the owner, the person performing such labor is not entitled to be compensated therefor to the extent of the benefit received by the owner therefrom? The affirmative of this proposition the plaintiffs undertook to support, having first laid the foundation for it by showing the cutting of the wood under an honest mistake as to the location of their land, the taking possession of the wood afterwards by the mining company, and its value in the condition in which it then was and where it was, as compared with its value standing in the woods.

We understand it to be admitted by the plaintiffs that no authority can be found in support of the proposition thus stated. It is conceded that at the common law when one thus goes upon the land of another on an assumption of ownership, though in perfect good faith and under honest mistake as to his rights, he may be held responsible as a trespasser. His good faith does not excuse him from the payment of damages, the law requiring him at his peril to ascertain what his rights are, and not to invade the possession, actual or constructive, of another. If he cannot thus protect himself from the payment of damages, still less, it would seem, can he establish in himself any affirmative rights, based upon his unlawful, though unintentional encroachment upon the rights of another. Such is unquestionably the rule of the common law, and such it is admitted to be.

It is said, however, that an exception to this rule is admitted under certain circumstances, and that a trespasser is even permitted to make title in himself to the property of another, where in good faith he has expended his own labor upon it, under circumstances which would render it grossly unjust to permit the other party to appropriate the benefit of such labor. The doctrine here invoked is the familiar one of title by accession, and though it is not claimed that the present case is strictly within it, it is insisted that it is within its equity, and that there would be no departure from settled principles in giving these plaintiffs the benefit of it.

The doctrine of title by accession is in the common law as old as the law itself, and was previously known in other systems. Its general principles may therefore be assumed to be well settled. A wilful trespasser who expends his money or labor upon the property of another, no matter to what

extent, will acquire no property therein, but the owner may reclaim it so long as its identity is not changed by conversion into some new product. Indeed some authorities hold that it may be followed even after its identity is lost in a new product; that grapes may be reclaimed after they have been converted into wine, and grain in the form of distilled liquors. *Silbury v. McCoon*.¹ See *Riddle v. Driver*.² And while other authorities refuse to go so far, it is on all hands conceded that where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title to the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than *Wetherbee v. Green*,³ in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of \$25, and converted them into hoops worth \$700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in *Wetherbee v. Green*. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed as a rule that a man prefers his trees cut into cord wood rather than left standing, and if his right to leave them uncut is interfered with even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one

¹ 3 N. Y. 379.² 12 Ala. 590.³ 22 Mich. 311.

be vigilant and careful of the rights of others, if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment and receives his remuneration; while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

A case could seldom arise in which the claim to compensation could be more favorably presented by the facts than it is in this; since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by its operation in an individual case, but by its general workings. If a mechanic employed to alter over one man's dwelling-house, shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a large expenditure of labor shall thoroughly overhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or if he takes possession, must pay for labor expended upon it which he neither contracted for, desired, nor consented to? And if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next be demanding payment for the transportation; and the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin.

The judgment of the Circuit Court must be reversed, with costs and a new trial ordered.

The other Justices concurred.

Plff apparently had title to certain land - saw good title & they are in same. It was affirmed & decided by the U.S. that Plff's title was void & that the rightful owner. Plff sued to recover amount of the payment & that he did not act officiously but in good faith & in ignorance he had [Reported in 51 Iowa Reports, 555.] got the title which he most nearly had, and that he is entitled to recover

GOODNOW v. MOULTON et al. title was void & that by

IN THE SUPREME COURT OF IOWA, SEPTEMBER 17, 1879.

Action in equity. A decree was entered in the Circuit Court dismissing the petition, and plaintiff appeals.

George Crane and John Doud, Jr., for appellant.

Clark & Connor for appellees.

SEEVERS, J. In 1863 the Iowa Homestead Company purchased, and there was conveyed to said company by the Dubuque & Sioux City Railroad Company, certain lands described in the petition. Other lands were embraced in the same conveyance, which purported to convey the fee simple title. In 1864, and every year thereafter up to and including 1871, the

Homestead Company paid the taxes levied on said land, which, during the period aforesaid, was not in the actual occupation of any one.

x The title of said company failed, as hereafter stated, and this action is brought to recover of the defendant Moulton, the owner of said lands, the taxes so paid, — the plaintiff having succeeded to all the rights of said company. An accounting is asked, and a decree that the amount found due be made a charge on the land. General relief is also asked.

When the taxes were paid it was believed by said company it was the owner of said lands, under the act of Congress known as the "railroad grant." The source of the defendants' title is the act of Congress granting lands in aid of the improvement of the Des Moines River.

From 1859, or before that time, up to December, 1872, the title to the land described in the petition was in dispute between parties claiming under said grants. During the greater portion, if not all of said period, the title was being litigated by those under whom the parties claim, or, more correctly speaking, there were actions pending in which the title to other lands than those described in the petition was being litigated.

In December, 1872, it was determined in *Homestead Company v. Valley Railroad*,¹ that the parties claiming under the act of Congress in aid of the improvement of the Des Moines River owned the legal title to said lands. This decision conclusively and finally determined that the Homestead Company did not own the lands described in the petition at the time the taxes were paid, but that the defendant Moulton was the owner. For a more full and complete history of the several acts of Congress, the legislation of the State, and the litigation resulting therefrom, see the above cited case; and *The Dubuque & Pacific R. Co. v. Litchfield*;² *Wolcott v. Des Moines Co.*,³ should also be consulted.

The taxes were paid "on the 28th day of February in each year, without any request from defendant Moulton, and, by mistake as to the ownership of said lands, in good faith, under the belief of ownership."

The lands were assessed to "unknown owners." The defendant Moulton has never paid or offered to pay any portion of said taxes. No objection is made to the form of the action.

As to the questions involved we have to say: —

I. It is regarded as well settled by authority that the general rule is, one person cannot make another his debtor by paying the debt of the latter without his request or assent, but it is believed to be equally well settled that a request or assent may be inferred under some circumstances; as if "one person see another at work in his field, and do not forbid him, it is evidence of assent, and he will be holden to pay the value of the labor. Sometimes the jury may infer a previous request, even contrary to the fact, on the ground of a legal obligation alone."⁴

Where one pays the funeral expenses of the deceased wife of another,

¹ 17 Wall. 153.

² 23 How. 66.

³ 5 Wall. 681.

⁴ 2 Greenleaf, Ev. § 108.

the latter being beyond the seas, a previous request will be inferred, because of the legal obligation resting on the husband. *Jenkins v. Tucker*.¹

*Nichol v. Allen*² was an action to recover for boarding the defendant's child. There was no evidence of a request or promise to pay. But the defendant had knowledge the child was boarding with the plaintiff; and it was said by Lord TENTERDEN, C. J., that "there is not only a moral but a legal obligation on the defendant to maintain his child; he knows where she is, and expresses no dissent, and does not take her away. There is a legal obligation made out, if it is shown she is maintained in the plaintiff's house, and he knows it; and it lies on the defendant to show that she is there against his consent, or that he has refused to maintain her any longer at his expense."

Where one person is compelled to pay money which another is under a legal obligation to pay, the one so paying may recover of the person legally bound. In such a case a previous request will be inferred. *Pownall v. Ferrand*;³ *Exall v. Partridge*;⁴ *Bailey v. Bussing*.⁵

If one person in good faith, because of a statutory obligation resting on him, or because public policy so requires, pays money another is under a legal obligation to pay, a previous request, we think, might well be inferred if he had knowledge of the payment at the time it was made; or, if he did not have knowledge until afterward, and there were a series of payments made from time to time, an assent should be presumed. As the Homestead Company was not, in fact, the owner, it was not, under ordinary circumstances, in a strict and technical sense bound or under obligation to pay the taxes; but under the peculiar circumstances of this case we think it was the duty of said company, and public policy required it, to pay said taxes, and Moulton should not be permitted to say otherwise.

Moulton knew, or was bound to know, the title to the lands was in dispute and being actually litigated for a series of years, and that the construction of the acts of Congress and the legislation of the State were involved. He failed to have the lands assessed in his name. He was bound to know the lands were taxable, and that the taxes had been paid by some one. Ordinary diligence would have developed the fact the payments were not made officiously or by an intermeddler, but by one clothed with an apparent title.

For the purpose of ascertaining whether the taxes were paid officiously, and whether it was the duty of the Homestead Company to pay the taxes, a brief glance at the litigation involving the title to these lands, and its effect, is requisite.

The case of *The Dubuque & Pacific R. Co. v. Litchfield* was decided in 1859, and its tendency was to show that the said lands passed under the railroad grant. At least it was then held said lands were not embraced

¹ 1 H. Bl. 90.

² 3 Car. & P. 35.

³ 6 B. & C. 439.

⁴ 87 R. 308.

⁵ 28 Conn. 453.

in the grant made in aid of the improvement of the Des Moines River. The inference from this decision could be fairly, and we have no doubt was indulged, that the lands passed under the railroad grant.

This decision was followed, in 1866, by the Wolcott case. This action was between parties, both of whom claimed under the river grant, and it was held that the title to such lands had passed thereunder. But as no one claiming under the railroad grant was a party to the action, it cannot be said the decision was of any bearing force as to them.

It was not until 1872 that there was an authoritative decision adverse to those claiming under the railroad grant. Under these circumstances the Homestead Company was fully justified in believing that it was clothed with the legal title. By no amount of care and diligence could it have arrived at any other conclusion. The title was in great doubt, and nothing under the circumstances, short of a decision of the Supreme Court of the United States, could reasonably be expected to settle the question. Until such decision was made it was the duty of parties claiming under both these grants to pay the taxes. Either was fully justified in so doing. The circumstances are peculiar and anomalous, and demand the establishment, or recognition, of a rule consonant with law, equity, justice, and common honesty. That the defendant should reimburse the plaintiff for the taxes paid there can be no doubt, unless there is some well recognized principle which forbids it. We do not believe there is any such. The foregoing views do not conflict with *Garrigan v. Knight*.¹ In that case the plaintiff purchased the land direct from the general government. About his title there could not be any dispute. This the defendant was bound to know. The latter, in fact, had no title, and this he was bound to know. Any one having ordinary knowledge of law could and would have so advised him. There was neither dispute nor litigation as to the title. The defendant, without inquiry or the use of ordinary diligence, paid the taxes. The payments, under such circumstances, were made officiously and by an intermeddler.

Something is said in *Homestead Company v. Valley Railroad*, before cited, which indicates that taxes paid by the plaintiff in that action could not be recovered. If such point was in the case and really determined, it would be an authority in this action. That action was brought to determine the question of title, and we have looked in vain for anything in the statement of the questions involved, or the opinion of the court, which tends to show with any degree of certainty that the question of the right of the plaintiff to recover the taxes paid was in the case. We infer, from what is said by the reporter, that the matter of taxes was only so far involved as the same in a court of equity would affect or bear upon the question of title.²

¹ 47 Iowa, 525.

² It seems that the appellants, during this litigation, paid the taxes on a portion of these lands, and claim to be reimbursed for this expenditure in case the title is adjudged

II. The statute of limitations was pleaded in bar of a recovery. If an action accrued at the time the several payments were made, then all are barred except the last payment. On the other hand, if the cause of action did not accrue until it was authoritatively determined the Homestead Company did not have title, then none are barred.

This question was not determined below, and has not been argued by counsel for appellant, and but briefly by counsel for the appellee. Under these circumstances no ruling should be now made as to this question.

The decree below will be reversed and the cause remanded, with directions to the Circuit Court to ascertain and determine the amount the plaintiff is entitled to recover, and to enter a decree making the same a lien on the land described in the petition, and providing in some proper manner for its enforcement.

Reversed.

HAWKINS, ETC. v. BROWN.

IN THE COURT OF APPEALS OF KENTUCKY, MARCH 30, 1882.

[*Reported in 80 Kentucky Reports, 186.*]

Rodes & Settle and *E. W. Hines* for appellant.

H. T. Clark for appellee.

Judge HARGIS delivered the opinion of the court.

THE appellee, a married woman, sold and conveyed a tract of land to the appellant.

She received and used the consideration, which was about the value of the land at the time she conveyed it.

Her husband did not join in the deed.

to be in the defendants, on the ground that they paid the taxes in good faith and in ignorance of the law. But ignorance of the law is no ground for recovery, and the element of good faith will not sustain an action where the payment has been voluntary, without any request from the true owners of the land, and with a full knowledge of all the facts. It is an elementary proposition, which does not require support from adjudged cases, that one person cannot make another his debtor by paying the debt of the latter without his request or assent.

It is true, in accordance with our decision, the taxes on these lands were the debt of the defendants, which they should have paid, but their refusal or neglect to do this did not authorize a contestant of their title to make them its debtor by stepping in and paying the taxes for them, without being requested so to do. Nor can a request be implied in the relation which the parties sustained to each other. There is nothing to take the case out of the well-established rule as to voluntary payments. If the appellants, owing to their too great confidence in their title, have risked too much, it is their misfortune, but they are not on that account entitled to have the taxes voluntarily paid by them refunded by the successful party in this suit. — DAVIS, J., delivering the opinion of the court in *Homestead Co. v. Valley Co.*, 17 Wall. 153, 166. [Ed.]

The appellant occupied the land for fourteen years, and erected lasting and valuable improvements on it, — more valuable than the land itself.

Then the appellee brought this suit to set aside the conveyance she had made, on the ground that she was a *feme covert* when and ever since she executed it, and sought to recover the land and the rents thereof.

The appellant resisted her prayer, and asked that he be reimbursed the purchase-money he had paid to her, with interest from the date of payment, and that he be adjudged the value of the lasting improvements, with interest thereon.

The court adjudged to her the land and cancelled the deed, and referred the cause to the Master to audit and report the rents and improvements.

The Master reported in favor of appellant the consideration he had paid and six per cent interest thereon; the taxes, and the enhanced vendible value of the land by reason of the improvements, but rejected his claim to interest on the last two named items. And he reported in her favor yearly rent to the amount of the united annual interest on the consideration and the prime cost of the improvements, which brought her in debt to the appellant in the sum of \$818.60.

Upon her exceptions the court set aside the commissioner's report, and rendered judgment in favor of appellant for \$232.60.

This result was reached by first stating the account thus : —

IN BEHALF OF APPELLANT.

Consideration	\$750.00
Interest on same	588.00
Taxes paid on land	54.60
Improvements	1,200.00
Total	<u>\$2,592.60</u>

IN BEHALF OF APPELLEE.

Rent for six years at \$60 per year	\$360.00
And eight years at \$250 per year	2,000.00
Total	<u>2,360.00</u>
Amount due Hawkins, appellant	<u>\$232.60</u>

The sum allowed appellant for the improvements was their prime cost, and the rent was fixed in favor of appellee at the value estimated from the opinions on that subject of the witnesses.

From the judgment giving to her the land there is no appeal, and the only question, therefore, for our consideration involves the propriety of the criteria upon which the court based its judgment.

In all cases of rescission of contract, the object of the Chancellor should be to place the parties, as far as possible, in the condition they occupied before making the contract. And the facts of each particular case must, in some degree, control the equitable adjustment of the rights of the parties.

In this case the appellant knew the appellee was a married woman when he contracted with her, and, as a matter of law, he is presumed to have known that she was incapable of contracting, but, as a matter of fact, he did not know she was so disabled by her coverture.

Shall he, as contended by appellee's counsel, be denied anything for his improvements because her disability was known to him? We think not.

This court held, in the case of *Bell's Heirs v. Barnett*,¹ that after judicial notice to an occupant under purchase that the land does not belong to him, he should be allowed pay for his improvements made after such notice so far as they enhanced the value of the land.

So in the case of *Thomas v. Thomas's Ex'r*,² it was held that the widow was in equity bound to account for improvements by which the vendible value of the land was increased, although when she signed the deed she was a *feme covert*, and was incapable of imposing a charge upon her property, or of disposing of it except in the mode and with the solemnities prescribed by law.

And in *Barlow v. Bell*,³ the land of the wife was sold by the agent of her husband, and after the death of the latter she sued and recovered the land, on the ground that she did not join in the sale or conveyance. The court refused the purchaser pay for his improvements, because he was shown to have had a perfect knowledge of the *feme covert's* title, and was advised of the consequences of a purchase from her husband's agent before he made it; yet it was said by the court that "we should have no hesitation in relieving the possessor for improvements made upon the land whilst he *bona fide* considered it his own. The possessor, by bestowing his money and labor in meliorating the land, advances its value, and consequently the rightful owner, unless liable to the claim of compensation, is so much the gainer by the loss of the possessor, contrary to the maxim *nemo debet locupletari aliena jactura*."

These principles apply to the facts of this case. It appears that these improvements were not, in fact, made *mala fide*, but under the mistaken belief that the wife had the right to sell her own land without the conjunction of her husband. And she, having actively and willingly participated in the transaction, there being no fraud or deceit practised by the appellant, should be required to do equity, and pay for the improvements, which she necessarily recovers with the land, to the extent that they enhance its vendible value.

And the rule as to the *quantum* of rents laid down in *Morton's Heirs v. Ridgeway*,⁴ etc., is, in our opinion, applicable to this case. There it was said: "The rents should be regulated by the interest on the consideration and on the value of the improvements, being neither greater nor less than their united amount."

¹ 2 J. J. Mar. 520.

² 16 B. Mon. 409.

³ 1 Marsh. 246.

⁴ 3 J. J. Mar. 258.

This was the criterion by which the Master was governed in his report, which should have been confirmed.

Wherefore, the judgment is reversed, with directions to overrule appellee's exceptions to the Master's report, and render judgment in conformity thereto.

GUSINE FREICHNECHT, COMPLAINANT, APPELLANT, v. MAGDALENA MEYER, DEFENDANT, RESPONDENT.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, MARCH TERM, 1885.

[Reported in 39 New Jersey Equity Reports, 551.]

ON appeal from a decree of the CHANCELLOR, whose opinion is reported in Freiknecht v. Meyer.¹

Messrs. *E. D. & W. B. Gillmore* for appellant.

Mr. *Joseph A. McCreery* for respondent.

The opinion of the court was delivered by

DIXON, J. The complainant filed her bill to redeem a lot of land in Jersey City from two mortgages, dated respectively February 6, 1869, and April 2, 1872, given by herself and husband to the defendant to secure \$400. The bill avers that about March 7, 1878, the defendant took possession of the mortgaged premises as mortgagee, and still holds the same, and prays that an account may be taken and allowance made to the complainant of the rents and rental value of the property; and that if any balance shall appear to be due the defendant on her mortgages, she may be decreed to surrender the mortgaged premises to the complainant on payment of such balance, which the latter tenders herself ready to pay.

The defendant's answer admits the mortgages, and the entry into possession about March 7, 1878, but alleges that the defendant "entered into and has since remained in possession of said mortgaged premises, as stated in the bill, but not simply as mortgagee thereof, but also as owner by purchase of the equity of redemption which the complainant theretofore had in said premises."

The answer then sets forth the means by which the defendant claimed to have become the owner; namely, a judgment in her favor against the complainant, obtained in a court for the trial of small causes, for a debt outside of the mortgage debts; the docketing of that judgment, in due form of law, in the Common Pleas of Hudson county; a *fi. fa.* from the Common Pleas, and a sale and conveyance of the premises by the sheriff of Hudson county to the defendant. The answer further avers that the

¹ 11 Stew. Eq. 315.

complainant acquiesced in said conveyance, and thereupon voluntarily surrendered the possession of the premises to the defendant, who entered, paid off taxes, water-rents, and assessments, and some time afterwards made valuable improvements upon the property.

The complainant filed a general replication.

About the time the bill was exhibited, the complainant brought an action of ejectment for the premises against the defendant, in the Hudson County Circuit, to which the defendant pleaded the general issue, and on particulars of her title being demanded, set up the mortgages and the sheriff's deed, with the proceedings whereon it rested. Thereupon the complainant applied to the CHANCELLOR for an order that the ejectment suit should stand as an issue from chancery to try the title under the sheriff's deed presented by the answer, and that the defendant should be restrained from relying thereon upon the mortgage, so that it might be ascertained at law whether the complainant was still the owner of the equity of redemption. The defendant opposing this application, it was denied.

Proofs were then taken in the cause, which established the facts alleged in the pleadings, except that they also developed the matter upon which the complainant relied to show that the defendant's title under the sheriff's deed was on its face illegal and void.

At final hearing, the CHANCELLOR dismissed the bill on the ground that it was silent as to the sheriff's deed, and stated that the defendant took possession as mortgagee, when in fact she entered as owner of the equity of redemption, and held under both the sheriff's deed and the mortgages. He declined to pass upon the validity of that deed, because the bill raised no issue thereon, and said that if it had raised such an issue, the court would have had no jurisdiction over it, it being a purely legal question.

From this dismissal the complainant appeals.

The case, however, presents circumstances which require the court to impose on the complainant certain conditions precedent to the exercise of her right to redeem; namely, the payment to the defendant of a fair compensation for the permanent improvements she has made.¹ It appears that before the sheriff's sale both complainant and defendant believed that such sale would be valid, and some negotiations passed between them on that assumption, from which the defendant not unreasonably inferred that the complainant was willing she should take the property in satisfaction of her judgment, if no one else would bid more; that after the sale, both parties believing it to have been legal, the complainant surrendered and the defendant took and retained possession of the premises, and thereafter the defendant treated them as her own, making lasting improvements which greatly increased their value; that the complainant knew of these improvements and believed that the defendant was acting upon the idea

¹ Only so much of the opinion is given as relates to this question. — Ed.

that she was owner, yet never questioned her title nor objected to her conduct until this bill was filed. Now, without undertaking to say that these facts would give the defendant a right to affirmative relief, we think it plain that they present a case for the application to the complainant of the maxim that they who seek equity must do equity. There would be a manifest inequity in the complainant's appropriating the benefit of the defendant's expenditures without compensation. Such an appropriation would be contrary to the expectation of both parties when the outlays were made. Against it the defendant has a perfect shield at law in her estate as mortgagee, and this court should not deprive her of that shield except upon terms which are just.

The complainant urges that the question whether the defendant's title was good or bad depended upon the sufficiency or insufficiency of the constable's written return to his execution, and hence was a question of law, the correct solution of which the defendant was bound to know; that therefore the defendant is chargeable with knowledge that she had no title except under her mortgages, and so must be held to have made the improvements as mortgagee; and that a mortgagee is not entitled to reimbursement beyond necessary repairs.

No doubt the general rule both at law and equity is, *ignorantia juris haud excusat*, as the courts of this State have repeatedly declared. *Garwood v. Eldridge*; ¹ *Bentley v. Whittemore*; ² *Hampton v. Nicholson*; ³ *Hayes v. Stiger*.⁴ The rule, however, has not been considered universal and inflexible. Thus, in *Champlin v. Laytin*,⁵ Vice-Chancellor M'Coun said: "As a general rule, this court does not relieve upon the ground of a mistake in matters of law, because every man is presumed to have a knowledge of the law. . . . Yet there are cases in which this court will interfere upon the ground of such mistake. . . . As, for instance, . . . if both parties should be ignorant of a matter of law, and should enter into a contract for a particular object, and the result according to law should be different from what they mutually intended, there, on account of the surprise or immediate result of the mistake of both, there can be no reason why the court should not interfere to prevent the enforcement of the contract and to relieve from the unexpected consequences of it. To refuse would be to permit one party to take an unconscientious and inequitable advantage of the other, and to derive a benefit from a contract which neither of them ever intended it should produce." On this principle he based his decree. On appeal,⁶ Chancellor WALWORTH, affirming the decree for other reasons, refrained from expressing any opinion one way or the other upon the point of decision below, which he said presented great difficulties on both sides. In the Court of Errors,⁷ notwithstanding Justice

¹ 1 Gr. Ch. 145.

² 3 C. E. Gr. 366.

³ 8 C. E. Gr. 423.

⁴ 2 Stew. Eq. 196.

⁵ 6 Paige, 189, 195.

⁶ 6 Paige, 202.

⁷ 18 Wend. 407.

BRONSON's elaborate and forcible presentation of the opposite view, Senator PAIGE stated his concurrence in the principle laid down by the Vice-Chancellor. So in England, Sir JOHN LEACH, V. C., in *Naylor v. Winch*,¹ said: "If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mistake;" and in *Clifton v. Cockburn*² Lord BROUGHAM said: "I think I could without much difficulty put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule and refuse to relieve against an error of law." Likewise, in *Stone v. Godfrey*,³ Lord Justice TURNER stated that he had no doubt the court had power to relieve against mistakes in law as well as against mistakes in fact. Similar *dicta* by all the justices appear in *Rogers v. Ingham*.⁴ See also *Stupilton v. Stupilton*.⁵ In the recent case of *Cooper v. Phibbs*⁶ the LORD CHANCELLOR of Ireland said: "No doubt a mistake in point of law may be corrected both in this court and in a court of law. This is now perhaps sufficiently established, though it was for some time a subject of controversy in courts of law;" and finally, when the case reached the House of Lords,⁷ Lord WESTBURY used this language: "It is said, *ignorantia juris hanc excusat*; but in that maxim the word *jus* is used in the sense of denoting general law, — the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact. It may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake." To the same effect is the language of Lord CHELMSFORD, in *Earl Beauchamp v. Winn*,⁸ concurred in also by the other lords.

These citations (and others of similar purport might be adduced) sufficiently indicate that in a court of equity, at least, a man is not under all circumstances to be regarded as fully comprehending all his legal rights and duties, so far as they grow out of facts which he knew or with reasonable diligence might have learned. Indeed, one large branch of equity jurisprudence — the reformation of written instruments — appears to rest mainly upon an exception to such a doctrine; for if parties acquainted with the tenor of documents which they execute are to be conclusively presumed to know also their legal import, it would seem that there could be no room for the notion that the writings did not express their real intention. But constantly courts of equity reform the most solemn instruments, upon the ground, not that the parties have inserted words

¹ 1 S. & S. 555.² 3 Myl. & K. 76.³ 5 De G. M. & G. 76.⁴ L. R. 3 Ch. D. 351.⁵ 2 L. C. in Eq. 1675.⁶ 17 Ir. Ch. Rep. 73.⁷ L. R. 2 H. L. 149.⁸ L. R. 6 H. L. 223, 234.

There are references to the law not private rights.

which they meant to exclude, or omitted words which they meant to insert, but that the language does not express their agreement; that they did not put upon the terms employed the same construction as the law does; in short, that there was a mutual mistake of law, — using the word “law” in its broader sense. *Weller v. Rolason*; ¹ *Green v. M. & E. R. R. Co.*; ² *Wanner v. Sisson*; ³ *Stines v. Hayes*.⁴

In this state of the decisions and *dicta*, it would be scarcely prudent to attempt to lay down a very comprehensive rule for the relief in equity against mistakes of law. I am not prepared to agree with Lord WESTBURY that in all cases the ownership of property is to be classed among matters of fact, or that in the maxim, *ignorantia juris haud excusat*, *jus* denotes only general law, — the ordinary law of the country, as distinct from the legal interpretation of private instruments. But I think it will be found to accord with the decisions, and with the safe and equitable conduct of affairs, to establish this rule: that whenever the mistake of law is mutual, and the party jeopardized thereby can be relieved without substantial injustice to the other side, there equity will afford redress; especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him.

In *Haggerty v. McCanna*,⁵ Chancellor ZABRISKIE felt the hardship of refusing assistance to a complainant who had spent his money in improving an infant's lands under the belief that they belonged to his wife, although his mistake was one of general law and could not be said to have been shared in by the defendant, an infant; nevertheless the CHANCELLOR intimated that relief would have been afforded if the defendant instead of the complainant had been an applicant for the exercise of equitable power. In *Putnam v. Ritchie*,⁶ which was like *Haggerty v. McCanna*, Chancellor WALWORTH, while refusing compensation to the complainant, said that his claim rested upon a principle of natural equity which was fully adopted in the Civil Law, and which in his own court was constantly acted upon where the legal title was in the person who had made the improvements in good faith, and where the equitable title was in another who was obliged to resort to the court of equity for relief; the court, he says, in such cases acts upon the principle that the party who comes as a complainant to ask equity must himself be willing to do what is equitable.

The case of *Cooper v. Phibbs*⁷ completely sustains the rule above enunciated. There, the father of the defendants had been entitled to an estate for life only in a fishery, but had supposed himself to be the absolute owner, and under that belief had laid out large sums of money in extending and improving it. On his death his heirs, the defendants, thought

¹ 2 C. E. Gr. 13.

² 1 Beas. 165; 2 McCart. 469.

³ 2 Stew. Eq. 141.

⁴ 9 Stew. Eq. 364; 11 Stew. Eq. 654.

⁵ 10 C. E. Gr. 48.

⁶ 6 Paige, 390.

⁷ 17 Ir. Ch. Rep. 73.

they had become its owners; and with that opinion they made a lease for years to the complainant, who had always entertained the same view of the title. In truth, on the death of the defendants' father the title had vested in the complainant for life by force of a trust agreement, the existence of which was known to all the parties, and the contents of which they knew or could readily have learned, but which had been misconstrued. The complainant, on coming to a recognition of his rights, filed a bill to set aside the lease. The House of Lords acceded to his prayer, but upon the terms that the expenditures of the former tenant for life in the permanent improvement of the fishery should be repaid to his representatives. *Vanderhaise v. Hugues*¹ seems to be of similar character. The defendant was in fact mortgagee in possession under a conveyance from the complainant absolute on its face. From the circumstances mentioned in the CHANCELLOR's opinion, it is to be inferred that the defendant had been considered by both himself and the complainant to be the absolute owner, and as such had made lasting improvements on the property. Chancellor GREEN decreed, on the complainant's bill to redeem, that the defendant must be allowed for those improvements.

The case before us stands upon the same footing, and the complainant should be permitted to exercise her right of redemption only on condition that she pay to the defendant the present value of the permanent improvements which she has made on the premises.

Therefore let the decree of the CHANCELLOR be reversed. Let an account be taken of the amount due the defendant for principal and interest on her mortgage, and in this account the mortgage must be regarded as not usurious; for besides the insufficiency of the averments of the bill touching usury, we think the evidence does not prove the charge. To this amount let the taxes, water-rents, and assessments, and the cost of necessary repairs paid by the defendant, with interest thereon, be added, so far as the same were not increased by the lasting improvements. From this total must be deducted what rents the defendant received, or without wilful default (*Seton on Decrees*, Heard's Ed., 487; *Vanderhaise v. Hugues*¹) might have received from the property in its unimproved condition, and a proper charge for the occupancy thereof by the defendant herself. The balance will be the price at which the complainant has the right to redeem. But let the value of the defendant's improvements also be ascertained, and the payment of such value to the defendant be decreed to be a condition precedent to the complainant's exercise of her right of redemption.

The defendant urges also that she should have a decree for payment of the sum which she bid at the sheriff's sale, being the amount of her docketed judgment. But we think this should not be accorded to her, for the reason that, the docketing proceedings being wholly void, the judg-

¹ 2 Beas. 410.

ment remains in the trial court unsatisfied and in full legal effect; her hold upon that judgment has not been impaired.

She also insists that her mortgagee, Harper, is a necessary party to the suit, and that as the complainant has not brought him in, no decree for redemption can be made. The case, however, does not disclose whether his mortgage was on record at the filing of the bill, so as to entitle him to be joined.¹ If it was, the complainant must amend.

Let the record be remitted, and a decree be made in accordance with the foregoing views. *Decree unanimously reversed.*

UNITED STATES *v.* PACIFIC RAILROAD. PACIFIC RAILROAD
v. UNITED STATES.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY 31, 1887.

[Reported in 120 *United States Reports*, 227.]

THESE were appeals from the Court of Claims. The case is stated in the opinion of the court.

Mr. *Attorney-General* and Mr. *E. M. Watson* for the United States.

Mr. *John F. Dillon* and Mr. *James Coleman* for the Pacific Railroad Company.

Mr. JUSTICE FIELD delivered the opinion of the court.

The Pacific Railroad Company, the claimant in this case, is a corporation created under the laws of Missouri, and is frequently designated as the Pacific Railroad of that State, to distinguish it from the Central Pacific Railroad Company incorporated under the laws of California, and the Union Pacific Railroad Company incorporated under an act of Congress, each of which is sometimes referred to as the Pacific Railroad Company.

From the 14th of August, 1867, to the 22d of July, 1872, it rendered services by the transportation of passengers and freight, for which the United States are indebted to it in the sum of \$136,196.98, unless they are entitled to offset the cost of labor and materials alleged to have been furnished by them, at its request, for the construction of certain bridges on the line of its road. The extent and value of the services rendered are not disputed. It is only the offset or charge for the bridges which is in controversy; and that charge arose in this wise: During the civil war, the State of Missouri was the theatre of active military operations. It was on several occasions invaded by Confederate forces, and between them and the soldiers of the Union conflicts were frequent and sanguinary. The people of the State were divided in their allegiance, and the country was ravaged by guerilla bands. The railroads of the State, as a matter of course,

¹ Rev. p. 118, § 78.

were damaged by the contending forces; as each deemed the destruction of that means of transportation necessary to defeat or embarrass the movements of the other. In October, 1864, Sterling Price, a noted Confederate officer, at the head of a large force, invaded the State and advanced rapidly towards St. Louis, approaching to within a few days' march of the city. During this invasion, thirteen bridges upon the main line and southwestern branch of the company's road were destroyed. General Rosecrans was in command of the Federal forces in the State, and some of the bridges were destroyed by his orders, as a military necessity, to prevent the advance of the enemy. The record does not state by whom the others were destroyed; but their destruction having taken place during the invasion, it seems to have been taken for granted that it was caused by the Confederate forces, and this conclusion was evidently correct. All the bridges except four were rebuilt by the company. These four were rebuilt by the government, and it is their cost which the government seeks to offset against the demand of the company. Two of the four (one over the Osage River and one over the Moreau River) were destroyed by order of the commander of the Federal forces. The other two, which were over the Maramee River, it is presumed, were destroyed by the Confederate forces.

Soon after the destruction of the bridges, and during the same month, General Rosecrans summoned to an informal conference, in St. Louis, several gentlemen regarded as proper representatives of the railroad company, being its president, the superintendent and the engineer of the road, and several of the directors. The court below makes the following finding as to what there occurred:—

"By General Rosecrans it was stated that the immediate rebuilding of the bridges was a military necessity; that he should expect and require the company to do all in their power to put the roads in working order at the earliest possible moment; and that he intended to have what work they did not do done by the government, and withhold from the freight earnings of the road a sum sufficient to repay the government for such outlays as in law and fact it should be found entitled to have repaid.

"The gentlemen present assured General Rosecrans, that they would do all in their power to rebuild the bridges and put the roads in working order at the earliest moment, but they at the same time represented that several of the bridges, as they believed, had been destroyed by the proper military authority of the United States, and that in such cases the government was properly responsible for the loss, and should replace the bridges. Those which the public enemy had destroyed they conceded that the company should replace.

"General Rosecrans replied in substance: 'Gentlemen, the question of the liability of the government for repairing damages to this road is one of both law and fact, and it is too early now to undertake the investigation of that question in this stirring time. I doubt myself whether all the

damages which you say the government should be responsible for, will be found liable to be laid to the charge of the government. Nevertheless, whatever is fair and right I should like to see done. You tell me now, and I have been informed by some of your representatives individually, that the company's means are insufficient to make these large repairs and make them promptly. Therefore, I want to say to you that, as a military necessity, we must have the work done, and shall be glad to have the company do everything it can, and I will undertake to have the remainder done, and we will reserve out of the freights money enough to make the government good for that to which it shall be found to be entitled for rebuilding any or all of the bridges, and we will return the freights to you or settle with you on principles of law and equity.'

"The gentlemen interested in the company reiterated their view of the case, that the company should pay for bridges destroyed by the public enemy, and that the government should replace at its own cost the bridges destroyed by its own military authorities."

The court also finds that these mutual representations and assurances were not intended or understood on either side to form a contract or agreement binding on the government or the company; that no formal action upon them was taken by the board of directors; and that there was no proof that they were ever communicated to the directors, except as may be inferred from subsequent facts and circumstances mentioned; but that the company, through its directors and officers, promptly exerted itself, to its utmost power, to restore the roads to running order, and to that end co-operated with the government.

At the same time, General Rosecrans informed the Secretary of War that the rebuilding of the bridges was "essential, and a great military necessity" in the defence of the State, and requested that Colonel Myers should be authorized "to have them rebuilt at once, the United States to be reimbursed the cost out of freight on the road." The Secretary referred the matter to the Quartermaster General, who recommended that General McCallum, Superintendent of Military Roads, be directed to take the necessary measures immediately for that purpose. The Secretary approved the recommendation, and General McCallum was thereupon ordered to cause the bridges to be rebuilt by the quickest and surest means possible. It does not appear that the company had any notice of these communications or of the order.

The bridge over the Osage River was destroyed on the 5th of October, 1861, by order of the officer commanding the central district of Missouri, acting under instructions from General Rosecrans to "use every means in his power to prevent the advance of the enemy." The court finds that the destruction was ordered for that purpose, and that the exigency appeared to the officer, and in fact was, of the gravest character, and an imperative military necessity. The government rebuilt the bridge, at

an expense of \$96,152.65; and this sum it seeks to charge against the company.

The bridge across the Moreau was also destroyed by command of the same officer, under the same military exigency. The company commenced its reconstruction, but, before it was completed, the work was washed away by a freshet in the river. The government afterwards rebuilt it at an expense of \$30,801; and this sum it also seeks to charge against the company.

The two bridges across the Maramec were destroyed during the invasion, as already stated, but not by the forces of the United States. They were, however, rebuilt by the government as a military necessity, at an expense of \$54,595.24; and this sum, also, it seeks to charge against the company. The Court of Claims allowed the cost of three of the bridges to be charged against the company, but rejected the charge for the fourth, — the one over the Osage River. The United States and the claimant both appealed from its judgment; the claimant, because the cost of the three bridges was allowed; the United States, because the charge for one of the four was disallowed.

The cost of the four bridges rebuilt by the government amounted to \$181,548.89. The question presented is, whether the company is chargeable with their cost, assuming that there was no promise on its part, express or implied, to pay for them. That there was no express promise is clear. The representations and assurances at the conference called by General Rosecrans to urge the rebuilding of the bridges were not intended or understood to constitute any contract: and it is so found, as above stated, by the court below. They were rebuilt by the government as a military necessity to enable the Federal forces to carry on military operations, and not on any request of or contract with the company. As to the two bridges destroyed by the Federal forces, some of the officers of the company at that conference insisted that they should be rebuilt by the government without charge to the company, and, though they appeared to consider that those destroyed by the enemy should be rebuilt by the company, there was no action of the board of directors on the subject. What was said by them was merely an expression of their individual opinions, which were not even communicated to the board. Nor can any such promise be implied from the letter of the president of the company to the Quartermaster General in November, subsequent to the destruction of the bridges, informing him that the delay of the War Department in rebuilding them had prompted the company to "unusual resources"; that it was constructing the bridges over the Gasconade and the Moreau Rivers, and that the only bridge on the main line to be replaced by the government was the one over the Osage River, the company having replaced all the smaller, and was then replacing all the larger ones. The letter only imparts information as to the work done and to be done in rebuilding the bridges on the main line. It contains no promise, as the court below seems to have thought, that, if

Quaere.

the government would rebuild the bridge over the Osage River, it should be reimbursed for any other it might rebuild on the main line of the company. Nor do we think that any promise can be implied from the fact that the company resumed the management and operation of the road after the bridges were rebuilt: but on that point we will speak hereafter. Assuming, for the present, that there was no such implication, we are clear that no obligation rests upon the company to pay for work done, not at its request or for its benefit, but solely to enable the government to carry on its military operations.

While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency,¹ the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government.

It is true that in some instances the works thus constructed may, afterwards, be used by the owner; a house built for a barrack, or for the storage of supplies, or for a temporary fortification, might be converted to some purposes afterwards by the owner of the land, but that circumstance would impose no liability upon him. Whenever a structure is permanently affixed to real property belonging to an individual, without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil; and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it. *Zottman v. San Francisco*.² Where structures are placed on the property of another, or repairs are made to them, he is supposed to have the right to determine the manner, form, and time in which the structures shall be built, or the repairs be made, and the materials to be used; but upon none of these matters was the company consulted in the case before us. The government regarded the interests only of the army; the needs or wishes of the company were not considered. No liability, therefore, could be fastened upon it for work thus done.

We do not find any adjudged cases on this particular point, — whether the government can claim compensation for structures erected on land of private parties, or annexed to their property, not by their request, but as a matter of military necessity, to enable its armies to prosecute their move-

¹ So much of the opinion as relates to this question has been omitted. — Ed.

² 20 Cal. 96, 107.

ments with greater efficiency; and we are unable to recall an instance where such a claim has been advanced.

It follows from these views, that the government can make no charge against the railroad company for the four bridges constructed by it from military necessity. The court will leave the parties where the war and the military operations of the government left them.

The judgment of the Court of Claims must, therefore, be reversed, and judgment be entered for the full amount claimed by the railroad company for its services; and it is so ordered.

622. 2 46 54 553.

CHAPTER IV.

BENEFITS CONFERRED AT REQUEST, BUT NOT IN THE CREATION OR PERFORMANCE OF A CONTRACT.

OSBORN *v.* THE GOVERNORS OF GUY'S HOSPITAL.

AT GUILDHALL, BEFORE RAYMOND, C. J., MICHAELMAS TERM, 1727.

[*Reported in 2 Strange, 728.*]

THE plaintiff brought a *quantum meruit pro opere et labore* in transacting Mr. Guy's stock affairs in the year 1720. It appeared he was no broker, but a friend; and it looked strongly as if he did not expect to be paid, but to be considered for it in his will. And the CHIEF JUSTICE directed the jury, that if that was the case, they could not find for the plaintiff, though nothing was given him by the will; for they should consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy cannot afterwards resort to his action.¹

ALFRED *v.* MARQUIS OF FITZJAMES.

AT NISI PRIUS, BEFORE LORD KENYON, C. J., EASTER TERM, 1799.

[*Reported in 3 Espinasse, 3.*]

ASSUMPSIT for servant's wages.

Plea, *non assumpsit*.

The plaintiff proved his employment as a servant in the family of the defendant, and relied on a *quantum meruit* for the time he had served.

It appeared in evidence, that the plaintiff came over from Martinique with the Duchess of Fitzjames, then Mademoiselle Le Brun. His father and mother had been slaves on an estate belonging to her in that island. He had entered into her service in Martinique, and continued to serve her after her marriage; and the Duke found him with necessaries of every description. There was no contract for any hiring for wages; but a witness said, that the Marquis had been heard to promise to pay him wages.

Lord KENYON asked Mr. *Erskine*, counsel for the defendant, if he objected to the demand *in toto*.

¹ The mere expectation of a legacy will not defeat a recovery. *Baxter v. Gray*, 4 Scott, N. R. 374. — ED.

Mr. *Erskine* said he did; that the contract was not a contract for any wages in Martinique, and had so continued in this country without any variation.

Lord KENYON said he was prepared to give a decided opinion: That up to the time of the promise to pay wages, which the witness had said the defendant had made, the plaintiff had no title to recover, as there was no original contract of service for wages.

Garrow and *Lawes* for the plaintiff.

Erskine for the defendant.¹

ABIGAIL GUILD v. CURTIS GUILD, ADMINISTRATOR.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1833.

[Reported in 15 *Pickering*, 129.]

THIS was assumpsit for labor and services performed for the intestate, who was the plaintiff's father.

At the trial before WILDE, J., evidence was introduced to prove, that after the plaintiff became twenty-one years of age, she continued to live in her father's family, and rendered the services for which she claimed compensation in this action; but there was no express evidence to show that her father agreed to pay her wages, or to prove upon what terms she lived in her father's family.

The defence rested on the ground, that the plaintiff's services were gratuitous and not rendered under any expectation of receiving wages or any compensation therefor, except by voluntary presents and accommodation, or by the share she might have expected to receive of the estate of her father, who was a man of considerable property. On this point circumstantial evidence was introduced on both sides.

The jury were instructed, that if they should find that the plaintiff, after arriving at twenty-one years of age, had rendered valuable services to her father, she would be entitled to a reasonable compensation therefor, unless they should be of opinion that she did not perform the services under an expectation of receiving wages or compensation, but with a view to the share which she might hope to have in her father's estate, by will or otherwise; that if the plaintiff had proved that she had performed valuable services, she had made out a *prima facie* case, as the presumption would be, that she was to receive compensation, unless it should appear that the services were gratuitous, and that such was the understanding of

¹ In *Negro Franklin v. Waters*, 8 Gill, 322, it was held that the defendant was not liable for services rendered by the plaintiff in ignorance of his manumission, the defendant, his former master, fraudulently concealing the fact from him. See, however, *Negro Peter v. Steel*, 3 Ycates, 250; *Kinney v. Cook*, 4 Ill. 232. — Ed.

The foundress is a more moral person

the parties; and that the burden of proof was on the defendant, to establish the fact that the services were not rendered under the expectation of wages or any pecuniary compensation.

The jury returned a verdict for the plaintiff.

If these instructions were incorrect, the verdict was to be set aside, and a new trial was to be granted; otherwise, judgment was to be entered on the verdict.

Mann for the defendant.

Metcalf for the plaintiff.

SHAW, C. J., afterwards drew up the opinion of the court. This motion for a new trial, for an alleged misdirection to the jury in point of law, has been long held under advisement, on account of a difference of opinion upon the points of law among the members of the court; and it has been often discussed, in the hope that this difference might be reconciled.

The point is, whether, where a daughter, after arriving at twenty-one years of age, being unmarried, continues to reside in her father's family, performing such useful services as it is customary for a daughter to perform, and receiving such protection, subsistence, and supplies of necessities and comforts, as it is usual for a daughter to receive in a father's family, the law raises any presumption that she is entitled to a pecuniary compensation for such services, and whether, after proving these facts, the burden of proof is on the defendant, to show that the services were performed without any view to pecuniary compensation.

Some of the court are of opinion, that as it is the ordinary presumption between strangers, that, upon the performance of useful and valuable services in the family of another, it is upon an implied promise to pay as much as such services are reasonably worth, so, after the legal period of emancipation, the law raises a similar implied promise from a father to a daughter.

Other members of the court are of opinion (confining the opinion to the case of daughters, and expressing no opinion as to the case of sons, laboring on the farm or otherwise in the service of a father), that the prolonged residence of a daughter in her father's family after twenty-one, performing her share in the ordinary labors of the family, and receiving the protection and supplies contemplated in the supposed case, may well be accounted for, upon considerations of mutual kindness and good will, and mutual comfort and convenience, without presuming that there was any understanding, or any expectation, that pecuniary compensation was to be made; that proof of these facts alone, therefore, does not raise an implied promise to make any pecuniary compensation for such services, or throw on the defendant the burden of proof to show, affirmatively, that the daughter performed the services gratuitously, and without any expectation of receiving wages or pecuniary compensation, but with a view to the share she might hope to receive in her father's estate or otherwise.

But the court are all of opinion, that practically the question is of much less importance than at first view it would appear. Those who think that the law raises no implied promise of pecuniary compensation, from the mere performance of useful and valuable services, under the circumstances supposed, are nevertheless of opinion, that it would be quite competent for the jury to infer a promise from all the circumstances of the case; and that although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed, that if under all the circumstances of the case the services were of such a nature as to lead to a reasonable belief, that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise, and a *quantum meruit*; but if otherwise, then they should find that there was no implied promise.

The conclusion, that the question is of less practical importance than might at first appear, is founded upon the obvious consideration, that it is scarcely possible that a case can be left to stand upon the mere naked presumption arising from the fact of the prolonged residence of a daughter in the family of her father, and the performance of services. There must of necessity be a great diversity of circumstances, distinguishing one case essentially from another. Such a continued residence of a daughter may, indeed must, be regarded under one of these three aspects: she may be a servant, or housekeeper, expecting pecuniary compensation for services; or a boarder, expecting to pay a pecuniary compensation for accommodations and subsistence; or she may be a visitor, expecting neither to make nor pay any compensation. Perhaps it might be safe to consider the latter predicament as embracing the larger number of cases.

Now the circumstances under which the parties continue to reside together, and which must almost necessarily be disclosed in the progress of each trial, will go very far to show, in which of these relations the daughter stood. Such considerations as the following, among many others, would arise,—What is the state and condition of the family as to affluence; was the father carrying on a business or engaged in an employment usually requiring the aid of hired females; had he been accustomed to employ such before the daughter came of age; did he employ such afterwards; had the father a wife living; was she capable of managing her family; or was he a widower; did the daughter act as housekeeper; had the father been accustomed to employ a housekeeper on wages; did he cease doing so; were there one, or two, or more daughters similarly situated; did they share in the labors of the family, or did the plaintiff exclusively devote herself to the service of the family; had the daughter property or means of her own to support herself, or had she been employed on wages in other families? Many other considerations of a like kind might be suggested, some, and probably many of which must present themselves in each case, and all of which it would be proper for a jury to take into consideration, in deciding

the question of an implied promise of pecuniary compensation upon either side.

The court being all of opinion that these are the proper subjects and sources of inquiry for a jury, I repeat, that it seems unimportant, as a rule of future practice, whether the jury shall be instructed to inquire and decide upon all the circumstances of the case, whether there was an implied promise; or that the proof of performance of services raises a presumption of such a promise, unless rebutted or controlled by all the circumstances of the case.

It only remains to state the judgment of the court upon the present motion. This motion is on the part of the defendant, to set aside the verdict, and grant a new trial, on the ground of a misdirection of the judge who tried the cause, in point of law. Upon this question the court being equally divided, the motion does not prevail, *Reed v. Davis*;¹ and of course judgment is to be rendered on the verdict for the plaintiff.

BENJAMIN F. ANDRUS AND WIFE *v.* JONATHAN FOSTER.

IN THE SUPREME COURT OF VERMONT, MARCH TERM, 1845.

[*Reported in 17 Vermont Reports, 556.*]

IN this case the whole matter in controversy was tried upon a declaration in offset filed by the defendant. Judgment to account was rendered, and an auditor was appointed, who reported, in substance, as follows, —

In 1821, the defendant, being childless, took the plaintiff's wife, then Susan Sanderson, who was then about eight or nine years of age, and who was a niece of his wife, to live with him until she should become of age. She continued to reside in his family until she became eighteen years of age, when he informed her that she was free to go, — but told her, that, "if she remained with him and did well, he would do well by her." Thereupon, being destitute of a home, she consented to stay with him, and worked for him as before, living in the family as a member of it, and attended school some, and was uniformly treated as she was before she became eighteen years of age; and during this time neither party kept any accounts against the other, — nor were any accounts made up between them until after the commencement of this suit. She continued thus to reside in the defendant's family, and worked for him, with but slight interruptions, and without any specified contract for her work, until about the year 1836, when she left and went to New Hampshire. At the time she left there was no settlement made between her and the defendant relative to her labor, nor was there

¹ 4 Pick. 217.

any talk of pay, or settlement, between them, and she did not then expect again to return and reside in his family. While she continued to reside in the family of the defendant, who was a farmer, she was able to do as much of most kinds of work ordinarily carried on in a farmer's family, as girls in general. She continued to reside in New Hampshire until February, 1841, when at the request of the defendant, she returned, and worked for him and in his family, until about three weeks before her intermarriage with the plaintiff Andrus, — which took place January 12, 1842.

On the hearing before the auditor the defendant objected to the competency of the plaintiff's wife as a witness; but, she being a party of record in the action, the objection was overruled and her testimony received.

The auditor reported that the labor of the plaintiff's wife for the defendant, after she returned from New Hampshire, as above stated, amounted with the interest, to \$42.75. It farther appeared that the defendant delivered to her, at the time she was married, and during the summer previous, various articles, including thirty dollars in money, amounting in the whole, as allowed by the auditor, to the sum of \$108.14; but the auditor reported that only thirty dollars of that sum was delivered in payment for her labor during that season, amounting, with the interest, to \$34.20, and leaving a balance due to her, for that season's work, of \$8.55. The auditor farther reported, that, if the defendant was liable to pay the plaintiff's wife for her services rendered subsequent to her becoming eighteen years of age, and before she went to New Hampshire to reside, there was due to the plaintiff, after deducting the whole of the above mentioned sum of \$108.14, the sum of \$103.67.

——— for plaintiffs.

J. R. Skinner & L. B. Peck for defendant.

The opinion of the court was delivered by

REDFIELD, J. The important question in this case is, whether a child, or foster-child, remaining at the house of its parent after the age of majority, and making that a home, the same as before, and assisting in the household labors (the child being a daughter), is entitled to a pecuniary compensation for her labor, the same as a stranger. We think it difficult to lay down any general rule upon the subject. Every case will be more or less affected by its own peculiar circumstances. The amount and kind of labor, the ability and necessity of the parent, the course of dealing between the parties, whether they keep accounts or not, whether the demand for compensation is made early, or is delayed for many years after the relation began, or, as in the present case, after it terminated, these, and many similar circumstances, will be significant indications of the expectation of the parties, at the time of the relation subsisting, which should determine their rights. The matter is, perhaps, as well summed up by Chief Justice SHAW, in *Guild v. Guild*,¹ as it can be. "Such a continued residence of a daughter may, indeed must, be regarded under one of these three aspects; She may be a

¹ 15 Pick. 129.

servant, or housekeeper, expecting pecuniary compensation for services; or she may be a boarder, expecting to pay pecuniary compensation for accommodations and subsistence; or she may be a visitor, expecting neither to make nor pay compensation. Perhaps it might be safe to consider the latter predicament as embracing the larger number of cases."

This would lead us to the same conclusion to which the court came in the case of *Fitch v. Peckham's Executrix*.¹ The rule there laid down by the CHIEF JUSTICE is, that the law in such cases will not ordinarily imply a promise on the part of the parent to make pecuniary compensation for the child's labor; or on the part of the child to make such compensation for her board. If the child, in such circumstances, bring suit for pay, it is incumbent upon her to show, that, at the time, it was expected by both parties that she should receive such compensation, or that the circumstances under which the services were performed were such, that such expectation was reasonable and natural.

In fact, I apprehend the circumstances of each case will usually remove all doubt of the expectation of the parties at the time. In the present case the plaintiff's wife had been brought up from a child by the defendant. At the time she became of age the defendant told her she was free to leave him, if she chose; if she remained with him and did well, he would do well by her. This was in 1829 or 1830, and she continued to reside with defendant until 1836, and labored most of the time. "She lived in the family as a member of it, and was uniformly treated as before she became of age." Neither party kept any account against the other; the plaintiff's wife had what she needed for her support, as before, and when she left, neither party expected her to return to reside any more with defendant. No settlement was made, and no claim for compensation made, until after the intermarriage of the plaintiffs, 12th January, 1842. About the first of February, 1841, she returned to live with the defendant at his request, and worked for him until about three weeks before her marriage. During this time the auditor estimates her services at \$37.50, and reports that the defendant furnished her with money and other things, such as she needed for housekeeping, to the amount of \$108.14. The auditor farther reports, that \$30 only of this last sum was paid to go towards the last term of labor, which would leave a balance in the plaintiff's favor, upon the last service, of \$8.55, including interest.

In regard to the first term of service, or residence, after the plaintiff's wife became of age, it is very obvious that neither party expected she was to receive any other pecuniary compensation than what defendant's generosity might prompt him to give. But in regard to the latter, it seems different. There is nothing which would induce us to doubt that compensation was expected. The only wonder is, that, when the defendant delivered \$108 during that term, he should not have first paid his debt, and left the

¹ 16 Vt. 150.

balance to go upon the score of gratuity, or generosity. Men are very likely to meet their debts first, and then discharge the more imperfect obligations. And it would seem that the auditor may have arbitrarily applied one certain item of \$30 (money) towards the last services, upon the mere supposition that that would best meet the moral equity of the case. Be that as it may, it is his province to decide the facts; and, as they stand, the plaintiffs are entitled to judgment for the sum of \$8.55. From the abstract in the Law Magazine, No. 5, April, 1844, p. 166, it seems that the Supreme Court of Pennsylvania have recently had this subject under consideration, and have come to the same determination as here made, which, in every view of the case, seems most just and reasonable.

Judgment of the County Court reversed, and judgment for the plaintiffs for \$8.55.

Green

MOSTELLER'S APPEAL.

IN THE SUPREME COURT OF PENNSYLVANIA, JANUARY TERM, 1858.

[*Reported in 30 Pennsylvania State Reports, 473.*]

APPEAL from the Orphans' Court of Monroe county.

This was an appeal by Philip Mosteller from the decree of the Orphans' Court, in the matter of the account of the said Philip Mosteller and Peter Mosteller, administrators of the estate of William Mosteller, deceased.

William Mosteller died intestate, on the 28th September, 1844, and letters of administration upon his estate were granted to the accountants. Before the auditors, Peter Mosteller, one of the accountants, claimed a credit for \$500, for work, labor, and services rendered to his father, the intestate, while a member of his family, for six or seven years after he arrived at full age. This claim was contested by the heirs; and the auditor's report allowing the said Peter Mosteller \$450 for his services, having been confirmed by the court, this appeal was taken.

H. Green for the appellant.

J. M. Porter and *M. Goepp* for the appellee.

The opinion of the court was delivered by

THOMPSON, J. The principle of the exception in this case is so fully embraced by the adjudications in *Walker's Estate*,¹ *Hack v. Stewart*;² *Cander's Appeal*;³ *Sanders v. Waggonseiler*;⁴ *Hertzog's Administrators v. Hertzog*;⁵ and *Lynn v. Lynn*;⁶ that it is only necessary to refer to them as concluding the contest here.

The appellee's claim against his father's estate was for work done on the farm, while living with him, during six or seven years after he came of age.

¹ 3 R. 243.

² 8 Barr, 213.

³ 5 W. & S. 516.

⁴ 7 Harris, 251.

⁵ 5 Casey, 465.

⁶ 5 Casey, 369.

There was no evidence that the work was done under a contract of hiring preceding it, and the only testimony on the essential point was given by John Lesh, a witness for the appellee, before the auditor, who detailed a conversation between him and the intestate, some four or five years before, in which he says, "The old man said he would like if Peter would take the lower place, at what he paid for it. He said, 'Be sure, we have put a barn on the place, but we can fix that another way.' I think he said they could fix it towards pay for work: the land he should have for what they paid. I understood him, that he owed Peter for wages."

As the law requires a hiring to be proved, to entitle a son to wages from a father with whom he remains after arriving at age, and who lives and works on the farm as he did before, and demands that the evidence of the contract "be clear, distinct, and positive," as was said in Candor's Appeal, we may add, in the language of that case, that, in every ingredient, we think the proof deficient in this case. There was nothing to aid this solitary *scintilla* of evidence, if it amounted to that, in raising even a probability that there was a contract of hiring between the father and son. There was no keeping of accounts for work between them, — no settlements, or reckonings, or payments of money, or conversations about it. While, on the other hand, there was much evidence to show that Peter did not consider himself as a hired hand.

The point that there is no implied contract arising from the performance of work by a son for his father, while living at home as one of his family, no matter what his age, that he will be paid for it, and that, where a claim for wages is made, it can only be successful when there is a contract, express, clear, distinct, and positive, has been so often announced by this court, that we cannot but think it is time it should be considered as settled and at rest. Strangely enough, however, it seems to be overlooked, and we still meet it among the subjects of contest. The court erred in confirming the auditors' report.

Decree reversed at the costs of the appellee, and the report confirmed, after deducting \$450 allowed Peter Mosteller, the appellee, as wages.

W. F. TURNER & W. E. OTIS v. O. M. WEBSTER.

IN THE SUPREME COURT OF KANSAS, JULY TERM, 1880.

[Reported in 24 Kansas Reports, 38.]

ACTION brought by Webster against Turner and another, partners, to recover for services rendered the defendants. Trial at the January term, 1879, of the District Court, and verdict and judgment for plaintiff. The defendants bring the case to this court. The facts are stated in the opinion.

J. D. McCue for plaintiffs in error.

Hill & Broadhead for defendant in error.

The opinion of the court was delivered by

BREWER, J. In an action commenced by plaintiffs in error, an attachment was issued, placed in the hands of the sheriff, and by him levied upon certain mill property. Pending the attachment proceedings, the sheriff, under direction of plaintiffs in error, employed defendant in error to watch the property; and this action was brought by defendant in error, plaintiff below, to recover for such services. That the sheriff was authorized by plaintiffs in error to employ defendant in error, and that the latter performed the services, are conceded facts. The dispute is as to the compensation. Webster claims that the contract price was three dollars per day, and that it was worth that amount; while Turner & Otis say that they authorized the sheriff to contract for only one dollar and a half a day, and the sheriff says that that was all he promised to pay. The misunderstanding seems to have arisen in this way: After the attachment, Turner & Otis requested the sheriff to find some one to guard the mill. Meeting Webster, he asked him what he would undertake the job for. He replied, one dollar and a half a day, and nights the same. The sheriff understood him to say and mean, one dollar and a half for each day of twenty-four hours, while plaintiff meant that amount for a day of twelve hours, and the same for the night time, or three dollars for every twenty-four hours. The sheriff reported the offer to Turner & Otis as he understood it, and they, after some hesitation, told him to accept the offer and employ Webster. Without further words as to the price, the sheriff gave the key of the mill to Webster and told him to go ahead. Now the contention of plaintiffs in error is, that the case turns on the law of agency; that they never personally employed Webster; that the sheriff was only a special agent with limited powers, only authorized to bind them by a contract to the amount of one dollar and fifty cents per day of twenty-four hours; that Webster is chargeable with notice of the extent of the sheriff's authority, and can enforce the contract as against the plaintiffs in error to the extent only of such authority. For any contract beyond that amount, the special agent binds himself alone, and not the principal. On the other hand, the defendant in error contends that where services are contracted for and rendered, and no price stipulated, the law awards reasonable compensation therefor, and that where there is a misunderstanding as to the price, the one party understanding it at one sum and the other at a different, there is no stipulation as to the price, and that it makes no difference whether the contract be made through an agent or with the principal directly. In the case at bar, he contends that it is immaterial that the conversation and misunderstanding were with the sheriff, the agent, and that the rule is just the same as though the talk and misunderstanding had been with Turner & Otis personally.

We think the case rests upon the propositions advanced by the defendant

misunderstanding
in 2. as to wages

To, power of special
agent, sheriff, to bind
the principal

1st. and 2d.

Contribution

in error. It will not be questioned, that, where the minds of two contracting parties do not come together upon the matter of price or compensation, but do upon all other matters of the contract, and the contract is thereupon performed, the law awards a reasonable price or compensation. Thus, where shingles were sold and delivered at \$3.25, but there was a dispute as to whether the \$3.25 was for a bunch or for a thousand, it was ruled, that unless both parties had understandingly assented to one of those views, there was no special contract as to price. *Greene v. Bateman*.¹ It is said by Parsons, in his work on Contracts, vol. 1, p. 389, that "there is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense." Here, Webster never assented to a contract to work for \$1.50 a day. He agreed to do a certain work, and did it; but his understanding was, that he was to receive \$3.00 per day. Turner & Otis employed him to do that work, and knew that he did it; but their understanding was, that they were to pay but \$1.50 a day. In other words, the minds of the parties met upon everything but the compensation. As to that, there was no *aggregatio mentium*. What, then, should result? Should he receive nothing, because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. The law, discarding both, says a reasonable compensation must be paid. So that if the negotiation had been between the parties directly, and this misunderstanding had arisen, the rule of reasonable compensation would unquestionably have obtained. Now, how does the law of agency interfere? The proposition of law advanced by counsel for plaintiff in error, that a special agent binds his principal to the extent only of the authority given, and himself by any promise in excess, is clear. But the agent made no promise in excess of his authority. He promised that which he was authorized to promise. Because the other party misunderstood the extent of the promise, is surely no reason for holding the agent bound for more than he did in fact promise. The agent has rights as well as the principal. The work is not done for his benefit. He has discharged his agency in good faith, and to the best of his ability. Why should he be mulcted in any sum on account of the misunderstanding of the party with whom he contracted? If compensation were given on the basis of his promise, then, if his promise was in excess of his authority, he should be responsible for the excess; but where the promise is ignored, and compensation given on the basis of value alone, he should not be charged with the excess of such value above his authority. An agent is responsible for good faith. That is not questioned. He does not insure, either to his principal or the opposite party. Acting in good faith and to the best of his ability, we can see no reason for making him responsible for any mere misunderstanding. Justice is done to all parties by ignoring any promise or

¹ 2 Woodb. & M. 239.

understanding as to compensation, and giving to the laborer reasonable compensation for the work done, and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor.

The case was submitted to the jury upon this basis, and while the instruction asked by plaintiffs in error and refused was unquestionably good law in the abstract, and while some criticism might fairly be placed upon one of the instructions given, and upon the answers of the jury to two special questions, we think the main question was fairly presented, and that no error appears justifying a reversal of the judgment, and it will be affirmed.

All the Justices concurring.

HOUCK'S EXECUTORS v. HOUCK.

IN THE SUPREME COURT OF PENNSYLVANIA, FEBRUARY 27, 1882.

[Reported in 99 Pennsylvania State Reports, 552.]

FEBRUARY 7th, 1882. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY, STERRETT, and GREEN, JJ.

Error to the Court of Common Pleas of Chester county: of January Term, 1882, No. 227.

Assumpsit, by Jacob Houck and Anne Houck, his wife, against Hiram Houck and Jacob Houck, executors of the will of Jacob Houck, deceased, "for work, labor, and services performed by the plaintiff at the special instance and request of the said Jacob Houck, deceased." The narr. also contained a count for "wages or salary of the said Anne Houck . . . as the hired servant of the said Jacob Houck, deceased." Pleas, *non assumpsit*; *non assumpsit infra sex annos*; payment; payment with leave, etc.; and set-off.

On the trial, before FUTHEY, P. J., the facts appeared to be as follows: The plaintiff, Anne Houck, lived with her parents, Jacob Houck, Sr., and Mary Houck, on their farm, performing household work, and taking care of her parents, both of whom were old and diseased. In 1878 she married Jacob Houck (her cousin), who lived on the farm as a hired hand. She and her husband continued to live on the farm after their marriage in the same manner as before, for about two years, until her mother's death, when they moved away. Her father died about a year and a half later. By his will Anne was left an equal share with his other children. About two months after his death Anne made a demand on his executors for the payment of wages as a domestic servant, and for nursing her mother, for a year and three months prior to her mother's death. This demand being refused, this suit was brought. No express promise of payment for services was shown.

The defendant presented the following points: —

1. The relationship of the parties is such that under the evidence the jury must find for the defendants. Refused.

2. The time which elapsed after the alleged claim accrued, and before any demand was made, such that the presumption of law, under the facts in this case, is "either that the wages have been paid, or that the services were performed on the footing that no payment was to be made;" and the jury must find for the defendants. Answer. In answer to this point I instruct you that the time which elapsed after this alleged claim accrued, and before any demand was made, is evidence to be considered by the jury in determining whether the presumption of law has been rebutted, — that the services were presumably to be paid for; and also as having a bearing upon the question as to whether any payment was originally contemplated by the parties, and whether or not any payment has been already made.

3. Under the evidence in the case, the verdict must be for the defendants. Answer. I cannot affirm this proposition. I have submitted the facts to the jury for their consideration.

Verdict and judgment for the plaintiffs for \$246. The defendants took this writ of error, assigning for error the answers to their points, as above.

Wm. M. Hayes for the plaintiffs in error.

R. E. Monaghan for the defendants in error.

Mr. Justice PAXSON delivered the opinion of the court, February 27th, 1882.

There is no merit in this case; yet if the law is with the plaintiffs below, the judgment must stand. It was a suit brought against the estate of the wife's father, to recover compensation for the services of the wife for a period of about one year and three months. Annie Houck, one of the plaintiffs, resided with her father as a member of his family, and assisted in the work of the house. She had two children prior to her present marriage, who were also a part of the family, and, as the evidence shows, supported mainly by her father. She was married to Jacob Houck, plaintiff, in October, 1878. At the time of said marriage, and for some time prior thereto, the said Jacob Houck lived with her father as a farm hand at the wages of \$10 per month. This arrangement continued for about one year and three months after the marriage, and until the death of old Mr. Houck's wife, when the plaintiffs moved away. During this period the plaintiff, Jacob Houck, received his wages regularly, and no part of the present claim is for his services. The plaintiff, Annie Houck, continued as maid of all work; and particular stress is laid upon the fact, that she acted as nurse to her mother, who was then, and had been for many years, afflicted with a cancer, of which she died after much suffering, in January, 1880. There is no doubt the services of the daughter during this period were efficient and faithful, and to some extent of an unpleasant nature to perform. They were no more, however, than every daughter living with a mother is in

affection and duty bound to perform, and were not such as the law will imply a promise to compensate. Indeed, it was conceded by the court below, and by the counsel upon the argument, that the wife could not recover, as there was no evidence of any contract to pay for the services. It was urged, however, that after the marriage the services of the wife belonged to her husband, and that, inasmuch as he was a plaintiff in the action, he was entitled to recover. No authority was cited in support of this proposition, and I apprehend none can be found. The suit was brought, as before observed, by the husband and wife for the services of the latter. The learned judge ruled that the joinder of the wife was surplusage, and that the husband could recover as if this suit had been brought by him alone. We do not attach much weight to the fact that the wife is a co-plaintiff. That would be sticking in the bark. We rule the case upon the broader principle that as the wife, in the absence of an express contract, cannot recover, the husband has no higher right. When the plaintiffs were married, the wife was engaged in performing services for her parents, which the law raised no implied promise to compensate. He then had his option to dissolve that relation, or insist upon an express contract. He did neither. He continued to work on the farm as before, at his accustomed wages, and the wife continued in the performance of her services to her parents. There was no change of any kind. The elder Houck had no notice, that upon the day after the marriage, his daughter's services to her sick mother were no longer rendered from a sense of filial duty, and in consideration of past and present favors, but as a matter of business, with a debtor and creditor account. Nor was any such notice ever given him. So far as the evidence shows, there was no claim upon him for compensation, nor upon his estate, until some time after his death. If, therefore, the husband permitted his wife, after marriage, to continue in the service of her father precisely as before, he is as much precluded from recovering compensation as the wife would be.

Aside from this, if we disregard the relation of parent and child, and substitute that of master and servant, the recent case of *McConnell's Appeal*¹ is directly in the way of the plaintiffs. It was there held that "In this country (as in England) where a person serves in the capacity of a domestic servant, and no demand for payment of wages is made for a considerable period after such service has terminated, the inference is, either that the wages have been paid, or that the service was performed on the footing that no payment was to be made."

This, as was stated in the case cited, is a presumption of fact, and liable to be rebutted. There was not a particle of evidence in this case, to rebut this presumption. Old Mr. Houck was in circumstances that enabled him to pay; the fact was conceded that the husband had been regularly paid his wages as a farm hand up to the time they left. Yet, as before stated,

¹ 1 Out. 31.

no demand appears to have been made for the services of the wife, either during the period of such service, at the time they went away, or afterwards and during the lifetime of Mr. Honck, the elder. So far from the presumption referred to having been rebutted, the evidence leaves the strong impression that the claim was an afterthought, and an attempt, after the death of the defendant's testator, to gain a larger share of his estate, and justifies the remark of LOWRIE, J., in *Lynn v. Lynn*:¹ "Here is another claim that ought to be charged to the account of family relationship. . . . Causes of this character are among the most odious that courts have to deal with."

The claim in this case is particularly odious, in view of the peculiar circumstances under which the wife and her two children were cared for and sheltered in her father's house.

All of the defendant's points should have been affirmed.

Judgment reversed.

HATTIE A. KNEIL, ADMINISTRATRIX, v. FRANCIS EGLESTON,
ADMINISTRATOR.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 24, 1885.

[*Reported in 140 Massachusetts Reports, 202.*]

CONTRACT, in two counts, by the administratrix of the estate of Waitey Ann Noble, against the administrator *de bonis non* with the will annexed of the estate of Augustus Noble. The first count was for money lent, and the second count was for money had and received.

At the trial in the Superior Court, without a jury, it appearing upon the reading of the papers, and from the statements of counsel, that Augustus Noble and Waitey Ann Noble in their lifetime were husband and wife, and that this action was brought to recover from the husband's estate a sum of money which he received from his wife a few months before his death, upon his promise to return it, or a like sum, to her in a short time, ROCKWELL, J., without hearing any evidence, ruled that the action could not be maintained on either count of the declaration; and ordered judgment for the defendant. The plaintiff alleged exceptions.

A. M. Copeland for the plaintiff.

H. Fuller for the defendant.

DEVENS, J. We do not perceive how, consistently with well-settled principles, the plaintiff in this case can recover. While, by statute, the wife may make contracts in the same manner as if she were sole, no authority has been given by which husband and wife may make contracts each with the other.² Their legal incapacity thus to contract remains as at common

¹ 5 Casey, 369.

² St. 1874, c. 184, § 1; Pub. Sts. c. 147, § 2.

law. At law, it has been repeatedly decided in this Commonwealth that a promissory note, or any other personal contract, made between the husband and wife, is absolutely void. *Ingham v. White*;¹ *Fowle v. Torrey*.² A contract with the wife for the payment of money by the husband is a nullity, and his retention of the money is not a conversion. *Bassett v. Bassett*.³ Even where a wife transferred a promissory note to a third person, which had been made to her by her husband, so that the mere disability to sue arising out of the marital relation was removed, such person could not maintain the action. *Ingham v. White*.¹

In the case at bar, the fact that the wife survived the husband could not make that a good contract which was originally a nullity. *Butler v. Ives*⁴ is quite distinguishable, the contract there considered being valid in its inception.

The plaintiff contends that, under her declaration, which contained two counts, one for the loan of money, and the other for money had and received, the latter permitted the court to deal with the transaction on equitable principles; and that the presiding judge erred in declining to receive evidence as to the transaction. But the presiding judge did not decline to receive evidence; he ruled, simply upon the statement of counsel, that the husband received the money sued for "a few months before his death, upon his promise to return it, or a like sum, to her in a short time." The plaintiff did not express any wish to prove any case under the second count, except as it might be sustained by proof of this statement, which was applicable to each count. By this no evidence was shown upon which any trust could have been raised in the plaintiff's favor, if a trust could properly have been dealt with under the count for money had and received. No property of hers had passed into her husband's hands under any circumstances which would authorize any inference that it was to be held or kept as her separate property. The relation which they had established with each other was that of borrower and lender simply, and the contract they had thus assumed to make was a nullity. *Fowle v. Torrey*.²

It has indeed, been held that, where one renders service or conveys property as the stipulated consideration of a contract within the statute of frauds, if the other party refuses to perform and sets up the statute, the value of such service or property may be recovered. The obligation which would arise from the receipt or retention of value, to return or pay for the same, is not overridden, because the words of a form of a contract which did not bind the party repudiating it were uttered at the time. *Bacon v. Parker*.⁵ Between parties competent to contract, it is reasonable to infer that the party failing to perform that which he had agreed to do, and yet which he might lawfully do, promised that, if he availed himself of his right of rescission, he would return that which he received; and that the value

¹ 4 Allen, 412.² 135 Mass. 87.³ 112 Mass. 99.⁴ 139 Mass. 202.⁵ 137 Mass. 309.

2. Case where married woman loaned money to partner of her husband who partner told her she could not recover in not followed in any other state.

received or retained by him was so received only on these terms. In *Bacon v. Parker*, the parties were competent to contract with each other; but the inference that, if one contract was repudiated, another must be inferred, could not arise where parties were not competent to make any contract.

*Exceptions overruled.*¹

MARY J. COOPER v. JOHN F. COOPER *et al.*, ADMRS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 5, 1888.

[*Reported in 147 Massachusetts Reports, .*]

CONTRACT to recover for services as housekeeper for defendant's intestate. Trial in the Superior Court, before BACON, J., who directed a verdict for the defendants; and the plaintiff excepted. The facts appear in the opinion.

S. B. Allen for the plaintiff.

W. B. French for the defendants.

W. ALLEN, J. The plaintiff and James W. Cooper intermarried in the year 1869, and lived together as husband and wife until his death in 1885. After his death the plaintiff learned that a former wife, from whom he had not been divorced, was living, and brought this action of contract against his administrator to recover for work and labor performed by her as housekeeper while living with the intestate. The court correctly ruled that when the parties lived together as husband and wife there could be no implied promise by the husband to pay for such work. The legal relations of the parties did not forbid an express contract between them, but their actual relations and the circumstances under which the work was performed, negatived any implication of an agreement, or promise, that it should be paid for. *Robbins v. Potter*.²

The case at bar cannot be distinguished from that cited, unless upon the grounds that the plaintiff believed that her marriage was legal, and that the intestate induced her to marry him by falsely representing that he had been divorced from his former wife. But the fact that the plaintiff was led by mistake, or deceit, into assuming the relation of a wife, has no tendency to show that she did not act in that relation; and the fact that she believed herself to be a wife, excludes the inference that the society and assistance of a wife which she gave to her supposed husband was for hire. It shows that her intention in keeping his house was to act as a wife and mistress of

¹ Such a claim can be enforced in equity. *Woodward v. Woodward*, 3 DeG. J. & S., 672. And a payment of such a claim by the husband, if not made with a view to hindering, delaying, or defrauding creditors, is valid as against creditors. *Medsker v. Bonebrake*, 108 U. S. 66; *Atlantic National Bank v. Tavener*, 130 Mass. 407; *Jaycox v. Caldwell*, 51 N. Y. 395. — Ed.

² 11 Allen, 585; s. c. 98 Mass. 532.

a family and not as a hired servant. There was clearly no obligation to pay wages arising from contract; and the plaintiff's case is rested on the ground that there was an obligation, or duty, imposed by law, from which the law raises a promise to pay money upon which the action can be sustained.

The plaintiff's remedy was by an action of contract for breach of promise to marry, or, if she was induced to marry by false representations, by an action of tort for the deceit. *Blossom v. Barrett*.¹ Her injury was in being led by the promise or the deceit to give the fellowship and assistance of a wife to one who was not her husband, and to assume and act in a relation and condition that proved to be false and ignominious. The duty which the intestate owed to her was to make recompense for the wrong which he had done to her. It is said that from this duty the law raised a promise to pay her money for the work performed by her in housekeeping. The obligation to make compensation for the breach of contract could be enforced only in an action upon the contract. The obligation to make recompense for the injury done by the tort was imposed by law and could be enforced only in an action of tort; it was not a debt or duty upon which the law raised a promise which would support an action of contract. The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy; and in that sense may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. *Jones v. Hoar*; ² *Brown v. Holbrook*; ³ *Ferguson v. Carrington*.⁴ See also Metcalf on Contracts, 9, 10; Chitty on Contracts, 87; *Earle v. Coburn*; ⁵ *Milford v. Commonwealth*.⁶

But the objection to maintaining the plaintiff's action lies deeper. The work and labor never constituted a cause of action in tort. The plaintiff could have maintained no action of tort against the intestate for withholding payment for the work and labor in housekeeping, or for, by false representations, inducing her to perform the work without pay. The particular acts which she performed as a wife were not induced by the deceit, so that each would constitute a substantive cause of action, but by the position which she was deceived into assuming, and would be elements of damage in an action for that deceit. Labor in housekeeping was a small incident to a great wrong, and the intestate owed no duty and had no right to single that out and offer payment for it alone; and the offer to do so might well have been deemed an aggravation of the injury to the plaintiff.

We have been referred to *Higgins v. Breen*⁷ and *Fox v. Dawson*,⁸ as decisions contrary to the conclusion which we have reached. It does not appear upon what ground the latter case was decided. The former was decided in

¹ 37 N. Y. 434.² 5 Pick. 285.³ 4 Gray, 102.⁴ 9 B. & C. 59.⁵ 130 Mass. 596.⁶ 144 Mass. 64.⁷ 9 Misso. 493.⁸ 8 Martin, 94.

favor of the defendant, the administrator, upon technical grounds, but the question of his liability was considered. It was assumed that an action of contract could have been maintained against the intestate for work and labor, and the question discussed was whether the action would survive against his administrator, and it was held that it would. Upon the evidence in the present case we think that no action, certainly no action of contract, for the cause of action declared on, could have been maintained against the intestate. Even if the intestate had been liable in tort, we are not prepared to assent to the proposition that an action of contract will lie against an administrator for a tort of his intestate for which no action of contract could have been maintained against him.

In the opinion of a majority of the court, the entry must be

Exceptions overruled.

CHAPTER V.

RECOVERY OF MONEY PAID UNDER COMPULSION.¹

SECTION I.

UNDER COMPULSION OF LEGAL PROCESS.

MOSES *v.* MACFERLAN.

IN THE KING'S BENCH, MAY 19, 1760.

[*Reported in 2 Burrow, 1005.*]

LORD MANSFIELD delivered the resolution of the court in this case, which stood for their opinion: "Whether the plaintiff could recover against the defendant in the present form of action (an action upon the case for money had and received to the plaintiff's use), or whether he should be obliged to bring a special action upon the contract and agreement between them."

It was an action upon the case, brought in this court by the now plaintiff, Moses, against the now defendant, Macferlan (heretofore plaintiff in the Court of Conscience, against the same Moses now plaintiff here), for money had and received to the use of Moses, the now plaintiff in this court.

The case, as it came out upon evidence and without dispute at *nisi prius* before Lord MANSFIELD at Guildhall, was as follows:—

It was clearly proved, that the now plaintiff, Moses, had indorsed to the now defendant, Macferlan, four several promissory notes made to Moses himself by one Chapman Jacob, for 30s. each, for value received, bearing date 7th November, 1758; and that this was done in order to enable the now defendant Macferlan to recover the money in his own name, against Chapman Jacob. But previous to the now plaintiff's indorsing these notes, Macferlan assured him "that such his indorsement should be of no prejudice to him;" and there was an agreement signed by Macferlan, whereby he (amongst other things) expressly agreed "that Moses should not be liable to the payment of the money, or any part of it; and that he should not be prejudiced, or be put to any costs, or any way suffer, by reason of such his indorsement." Notwithstanding which express condition and agreement, and contrary thereto, the present defendant Macferlan summoned the present plaintiff Moses into the Court of Conscience, upon each

¹ The chronological arrangement of cases has been departed from to some extent in this chapter. — ED.

of these four notes, as the indorser thereof respectively, by four separate summonses. Whereupon Moses (by one Smith, who attended the Court of Conscience at their second court, as solicitor for him and on his behalf) tendered the said indemnity to the Court of Conscience, upon the first of the said four causes; and offered to give evidence of it and of the said agreement, by way of defence for Moses in that court. But the Court of Conscience rejected this defence, and refused to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge of it; and gave judgment against Moses, upon the mere foot of his indorsement (which he himself did not at all dispute), without hearing his witnesses about the agreement "that he should not be liable;" for the commissioners held this agreement to be no sufficient bar to the suit in their court; and consequently decreed for the plaintiff in that court, upon the undisputed indorsement made by Moses. This decree was actually pronounced in only one of the four causes there depending; but Moses's agent (finding the opinion of the commissioners to be as above mentioned) paid the money into that court upon all the four notes; and it was taken out of court by the now defendant Macferlan (the then plaintiff in that court) by order of the commissioners.

All this matter appearing upon evidence before Lord MANSFIELD at nisi prius at Guildhall, there was no doubt but that, upon the merits, the plaintiff was entitled to the money; and accordingly a verdict was there found for Moses, the plaintiff in this court, for 6*l.* (the whole sum paid into the Court of Conscience), but subject to the opinion of the court upon this question, "Whether the money could be recovered in the present form of action, or whether it must be recovered by an action brought upon the special agreement only."

On Saturday the 26th of April last

Mr. *Morton*, on behalf of the defendant Macferlan, moved to set aside this verdict found for the plaintiff, and to have leave to enter up judgment against the plaintiff, as for a nonsuit.

And in order to show that the action was not maintainable in its present form, he laid down a position, "that *indebitatus assumpsit* will not lie but where debt will lie:" it lies not upon a wager; nor upon a mutual assumption; nor against the acceptor of a bill of exchange; neither will it lie for money won at play: for it will never lie but where debt will lie, and can never be upon mutual promises. 1 Salk. 23, *Hard's case*, and *Smith v. Aiery*¹ are expressly so in terms.

And to maintain debt, there must be either an express contract broken, or an implied contract broken. But there is no contract either express or implied "that Moses would have this cause of action against Macferlan;" Chapin Jacob was only to pay Moses the money when it should be recovered by Macferlan. An indorsement of a promissory note is a just

¹ 6 Mod. 123.

cause of action : and Macferlan recovered this money of Moses the indorser, by judgment of a court of justice.

But this action "for money had and received to his use" is not the proper way of setting right the judgment of a court of justice.

This agreement could not repel the action before the Court of Conscience ; it was only the subject of an action to be brought upon itself. This appears from the case of *Beston v. Robinson*, in Cro. Jac. 218 ; where Beston was in execution upon a statute merchant at the suit of Robinson ; and brought an *audita querela*, and produced articles between him and Robinson as a discharge ; which was holden not good to discharge him of the execution ; but that his remedy was to have an action of covenant upon them. So in 1 Bulstr. 152. Anon. ; by WILLIAMS and the rest of the judges, "if the party be taken and imprisoned upon a judgment and execution, where he has paid the money, he shall not have a *supersedeas quia erronee*, nor no remedy, but only an *audita querela* ; and upon promise of enlargement, and not performing it, an action on the case only lieth for this, and no other remedy."

Mr. Norton, *contra*, for the plaintiff.

We have not misconceived our action ; we were not confined to bring an action upon the special agreement, but were at liberty to bring this action "for money had and received to our use," to recover this money unfairly received by the defendant.

I do not agree to the position, "that assumpsit will not lie but where debt will lie."

In the case of *Astley v. Reynolds*,¹ this principle was settled, viz : "That wherever a person has wrongfully paid money he may have it back again, by this action for money had and received to his use." And yet in that very case there was another remedy. And there was the consent of the payer too.

So likewise, for money paid on a contract which is never performed.

So, on a wager (on a horse-race) against the stakeholder, after the thing is completed and over.

And no inconvenience can arise : everything is done and finished in the present case, and no writ of error lies to the Court of Conscience ; nor can its judgments be over-haled.

The court, having heard the counsel on both sides, took time to advise.

Lord MANSFIELD now delivered their unanimous opinion, in favor of the present action.

There was no doubt at the trial, but that upon the merits the plaintiff was entitled to the money ; and the jury accordingly found a verdict for the 6*l.*, subject to the opinion of the court upon this question, "Whether the money might be recovered by this form of action," or "must be by an action upon the special agreement only."

¹ M. 5 G. 2 B. R. (V. 2 Strange, 915).

Many other objections, besides that which arose at the trial, have since been made to the propriety of this action in the present case.

The 1st objection is, "That an action of debt would not lie here; and no assumpsit will lie where an action of debt may not be brought;" some sayings at *nisi prius*, reported by note-takers who did not understand the force of what was said, are quoted in support of that proposition. But there is no foundation for it.

It is much more plausible to say, "That where debt lies an action upon the case ought not to be brought." And that was the point relied upon in Slade's case;¹ but the rule then settled and followed ever since is, "That an action of assumpsit will lie in many cases where debt lies, and in many where it does not lie."

A main inducement, originally, for encouraging actions of assumpsit was, "to take away the wager of law;" and that might give rise to loose expressions, as if the action was confined to cases only where that reason held.

2d Objection. "That no assumpsit lies except upon an express or implied contract; but here it is impossible to presume any contract to refund money which the defendant recovered by an adverse suit."

Answer. If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu," as the Roman law expresses it).

This species of assumpsit ("for money had and received to the plaintiff's use") lies in numberless instances for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had by law authority to receive from such third person.

3d. Objection. Where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be brought over again by a new action.

Answer. It is most clear "that the merits of a judgment can never be over-haled by an original suit, either at law or in equity." Till the judgment is set aside or reversed, it is conclusive, as to the subject-matter of it, to all intents and purposes.

But the ground of this action is consistent with the judgment of the Court of Conscience; it admits the commissioners did right. They decreed upon the indorsement of the notes by the plaintiff, which indorsement is not now disputed. The ground upon which this action proceeds was no defence against that sentence.

It is enough for us, that the commissioners adjudged "they had no cognizance of such collateral matter." We cannot correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction, to

¹ 4 Co. 92.

be right. But we think "the commissioners did right, in refusing to go into such collateral matter." Otherwise, by way of defence against a promissory note for 30s., they might go into agreements and transactions of a great value ; and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account.

Common right in
not going into the
the agreement

The ground of this action is not "that the judgment was wrong," but "that (for a reason which the now plaintiff could not avail himself of against that judgment) the defendant ought not in justice to keep the money." And at Guildhall I declared very particularly, "that the merits of a question determined by the commissioners, where they had jurisdiction, never could be brought over again in any shape whatsoever."

Money may be recovered by a right and legal judgment ; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment.

Suppose an indorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the indorser, who knew nothing of such payment.

Suppose a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home ; or upon the life of a man presumed to be dead, who afterwards appears ; or upon a representation of a risk deemed to be fair, which comes out afterwards to be grossly fraudulent.

But there is no occasion to go further ; for the admission "that, unquestionably, an action might be brought upon the agreement," is a decisive answer to any objection from the judgment. For it is the same thing, as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement, that the defendant may refund the money he received ; or, upon the agreement itself, that, besides refunding the money, he may pay the costs and expenses the plaintiff was put to.

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This brings the whole to the question saved at *nisi prius*, viz : "Whether the plaintiff may elect to sue by this form of action, for the money only ; or must be turned round, to bring an action upon the agreement."

Question

One great benefit which arises to suitors from the nature of this action is, that the plaintiff needs not state the special circumstances from which he concludes "that, *ex æquo et bono*, the money received by the defendant ought to be deemed as belonging to him ;" he may declare generally "that the money was received to his use," and make out his case at the trial.

This is equally beneficial to the defendant. It is the most favorable way in which he can be sued : he can be liable no further than the money he has received ; and against that may go into every equitable defence upon the general issue : he may claim every equitable allowance ; he may prove a release without pleading it ; in short, he may defend himself by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or to any part of it.

If the plaintiff elects to proceed in this favorable way, it is a bar to his bringing another action upon the agreement ; though he might recover more upon the agreement than he can by this form of action. And therefore, if the question was open to be argued upon principles at large, there seems to be no reason or utility in confining the plaintiff to an action upon the special agreement only.

But the point has been long settled, and there have been many precedents ; I will mention to you one only, which was very solemnly considered. It was the case of *Dutch v. Warren*.¹ An action upon the case for money had and received to the plaintiff's use.

The case was as follows : Upon the 18th of August, 1720, on payment of 26*l.* 10*s.* by the plaintiff to the defendant, the defendant agreed to transfer him five shares in the Welsh copper mines, at the opening of the books ; and for security of his so doing gave him this note : "18th of August, 1720. I do hereby acknowledge to have received of Philip Dutch 26*l.* 10*s.* as a consideration for the purchase of five shares ; which I do hereby promise to transfer to the said Philip Dutch as soon as the books are open, being five shares in the Welsh copper mines. Witness my hand, Robert Warren." The books were opened on the 22d of the said month of August, when Dutch requested Warren to transfer to him the said five shares ; which he refused to do, and told the plaintiff "he might take his remedy." Whereupon the plaintiff brought this action for the consideration-money paid by him. And an objection was taken at the trial, "that this action upon the case, for money had and received to the plaintiff's use, would not lie ; but that the action should have been brought for the non-performance of the contract." This objection was overruled by the CHIEF JUSTICE, who notwithstanding left it to the consideration of the jury, Whether they would not make the price of the said stock as it was upon the 22d of August, when it should have been delivered, the measure of the damages ; which they did, and gave the plaintiff but 175*l.* damages.

And a case being made for the opinion of the Court of Common Pleas, the action was resolved to be well brought ; and that the recovery was right, being not for the whole money paid, but for the damages in not transferring the stock at the time ; which was a loss to the plaintiff, and an advantage to the defendant, who was a receiver of the difference-money, to the plaintiff's use.

The court said, that the extending those actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuses to do it, it is a fraud ; and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it, or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use.

The damages recovered in that case show the liberality with which this

¹ M. 7 G. 1 C. B.

kind of action is considered ; for though the defendant received from the plaintiff 262*l.* 10*s.*, yet the difference-money only, of 175*l.*, was retained by him against conscience ; and therefore the plaintiff, *ex æquo et bono*, ought to recover no more ; agreeable to the rule of the Roman law : "*Quod conductio indebiti non datur ultra, quam locupletior factus est qui accepit.*"

If the five shares had been of much more value, yet the plaintiff could only have recovered the 262*l.* 10*s.* by this form of action.

The notion of fraud holds much more strongly in the present case than in that, for here it is express. The indorsement which enabled the defendant to recover was got by fraud and falsehood for one purpose, and abused to another.

This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund : it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law, — as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play ; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore we are all of us of opinion, That the plaintiff might elect to waive any demand upon the foot of the indemnity, for the costs he had been put to ; and bring this action to recover the 6*l.* which the defendant got and kept from him iniquitously.

Rule. That the postea be delivered to the plaintiff.

MARRIOTT *v.* HAMPTON.

IN THE KING'S BENCH, MAY 20, 1797.

[Reported in 7 Term Reports, 269.]

THE defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a *cognovit* for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord KENYON was of opinion at the trial that after the money had been paid under legal process it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses v. Macfarlan*¹ was referred to; and thereupon the plaintiff was nonsuited.

Gibbs now moved to set aside the nonsuit and to grant a new trial; relying on a subsequent case of *Livesay v. Rider*,² where on a similar motion the court held such an action maintainable. And he pressed for the opinion of the court in order that the question might be settled.

Lord KENYON, C. J. I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person. I cannot therefore consent even to grant a rule to show cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused; but this goes much further.

ASHMURST, J., of the same opinion.

GROSE, J. It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again because they were not properly prepared the first time with their evidence. Of the general principle there can be no doubt; and though the last case cited seems to throw some ambiguity upon it, yet some of the positions there stated³ are so entirely repugnant to every principle of law, that I have less difficulty in disregarding the whole authority of it.

LAWRENCE, J. If the case alluded to be law, it goes the length of establishing this, that every species of evidence which was omitted by accident

¹ 2 Burr. 1069.² E. 22 Geo. 3, B. R.³ Which his Lordship read from the note of it.

to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment ; which is too preposterous to be stated.

Rule refused.

HAMLET AND OTHERS v. RICHARDSON.

IN THE COMMON PLEAS, JANUARY 31, 1833.

[*Reported in 9 Bingham, 644.*]

THIS was an action for money had and received, in which the plaintiffs sought to get back a sum paid, as they alleged, to the defendant by mistake, in the course of some transactions arising out of a charter-party. It appeared, however, upon the trial of this cause, that the payment in question was made by the plaintiffs after, and in consequence of, the issuing of a writ against them for the amount. The payment was proved to have been made in the month of May, 1827, after process had been issued against the plaintiffs, in the month of April preceding, for the purpose of recovering this very sum, and after an appearance entered to such process. Before the writ was issued, the defendants in that action (the present plaintiffs) had received letters addressed to each of them, stating the intention to sue for the money now in question, in terms sufficiently explicit to call their attention to the subject in dispute ; after which, the money claimed in that action was paid.

But the jury having found a verdict for the plaintiffs, and also, that the payment had been made without knowledge or reasonable means of knowledge of the facts on which the demand had proceeded,

Jones, Serjt., *Bompas*, Serjt., with him, obtained a rule *nisi* to set aside the verdict.

Wilde, Serjt., *contra*.

Cur. adv. vult.

TINDAL, C. J. Upon the motion to set aside the verdict for the plaintiffs in this case, two points have been made ; first, that the verdict is against evidence ; and secondly, that the payment made by the plaintiffs was a payment made after, and in consequence of, the issuing of a writ against them, and being a payment under compulsion of legal process, the money paid cannot be recovered back. As to the first point, after full consideration of the evidence in the cause, we think the jury have not drawn a right conclusion from the facts proved before them ; but we hold it better not to enter into a discussion upon the particular facts, in order that the case may be laid before a second jury with the least possible prejudice against either party.

The consideration of the second point becomes therefore unnecessary ; but as it may be important for the plaintiffs to be acquainted with the

opinion we have formed upon the law, as it applies to the facts given in evidence on the former occasion, in order to regulate the course of their future proceedings, we shall state shortly such opinion. The payment was proved to have been made in the month of May, 1827, after process had been issued against the plaintiffs in the month of April preceding, for the purpose of recovering this very sum, and after an appearance entered to such process. Before the writ was issued the defendants in that action (the present plaintiffs) had received letters addressed to each of them, stating the intention to sue for the money now in question, in terms sufficiently explicit to call their attention to the subject in dispute; after which the money claimed in that action was paid. We think this money was paid under compulsion of legal process. In *Marriott v. Hampton*,¹ it does not appear to what precise point the action had been carried before the money was paid, though, from the circumstance of a *cognovit* having been given for the costs, it is probable the declaration had been delivered. But the judgment of the court is expressed in very general terms, namely, that "after a recovery by process of law, there must be an end of litigation." In *Brown v. M'Kinally*,² the payment made by the plaintiff in the former action, which had been brought against him by the defendant, was a payment made after action brought, but in what stage of the action does not appear. Lord KENYON held the action not maintainable, for that to allow it would be to try every such question twice. In *Milnes v. Duncan*,³ Mr. Justice HOLROYD says, "if the money had been paid after proceedings had actually commenced, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back." And as to the case of *Cobden v. Kendrick*,⁴ if it can be supported as to this point, we think it can only be so on the ground of fraud in the defendant. We think the rule of law is accurately laid down by Mr. Justice HOLROYD; and that, as the money was paid in this case after the suing out process to recover it, the defendants in the former action knowing the cause of action for which the writ was sued out before they paid the money, and there being no fraud on the part of the plaintiff in that action, it appears to us, that no action is maintainable to recover it back. The rule for a new trial must therefore be made absolute on payment of costs.

Rule absolute.

¹ 7 T. R. 269.

² 1 Esp. 279.

³ 6 B. & C. 679.

⁴ 4 T. R. 432.

DON NUNO ALVARES PEREIRA DE MELLO, DUKE DE
CADAVAL *v.* THOMAS COLLINS.

IN THE KING'S BENCH, APRIL 27, 1836.

[*Reported in 4 Adolphus & Ellis, 858.*]

ASSUMPSIT for money had and received, and on an account stated. Plea, *non assumpsit*. On the trial before Lord DENMAN, C. J., in London, February, 1835, it appeared that the plaintiff was a Portuguese nobleman, who had been a member of the Portuguese Government under Don Miguel. In July, 1834, the plaintiff arrived at Falmouth, with his family, from Portugal. Soon after his arrival, he received a letter from the defendant, dated 26th of July, 1834, stating that he had claims on the government of Don Miguel to the amount of 16,200*l.*, for services performed and pay due, as asserted; but making no claim on the plaintiff individually. The plaintiff took no notice of this letter. On the 5th of August he was arrested at the suit of the defendant, on a writ for 16,200*l.* against the plaintiff and Manuel Viscount de Santarem. The affidavit was for 10,000*l.* and upwards for work and labor. The plaintiff, who did not understand English, applied to the Portuguese Vice-Consul at Falmouth, and had an interview, in his presence, with the defendant, his brother, and an attorney, who attended on behalf of the defendant; and, after some negotiation, the following memorandum was drawn up and signed:—

We, the undersigned, agree to the following conditions:—

First, his Excellency the Duke of Cadaval pays 500*l.* in lawful money of Great Britain to Thomas Collins, as a payment in part of the writ issued in London for 16,200*l.*, and the remainder his Excellency to give bail immediately; to run the usual course of an action in the Court of King's Bench; both of us the undersigned to abide by the result; the said 500*l.* to be paid at nine o'clock to-morrow morning, for which Mr. Lake the consul is responsible.

FALMOUTH, 5th August, 1834.

DUQUE DE CADAVAL.
THOMAS COLLINS.

The plaintiff was then released; and, on the 6th of August, the following agreement was signed by the parties:—

An agreement made and entered into, this 6th day of August, 1834, between Thomas Collins, of Platt Terrace, in the County of Middlesex, Esquire, of the one part, and his Excellency the Duke de Cadaval, at present residing at Falmouth, in the County of Cornwall, of the other part. Whereas the said Thomas Collins did lately cause a writ of *capias* to be issued out of His Majesty's Court of King's Bench at Westminster against

the said Duke de Cadaval and one Manuel Viscount de Santarem, at the suit of him the said Thomas Collins, for the sum of 16,200*l.*, and whereas the said Duke de Cadaval was, on the 5th day of the said month of August, at Falmouth aforesaid, arrested and taken into custody by virtue of a warrant granted on the said writ of *capias* by the sheriff of Cornwall aforesaid, and whereas¹ the said Duke de Cadaval, not being at present prepared to give the required bail to the said sheriff of Cornwall: and it is hereby declared and agreed by and between the said Thomas Collins and the said Duke de Cadaval that, in consideration of the sum of 500*l.* of lawful British money to the said Thomas Collins in hand paid by the said Duke de Cadaval, at or upon the execution of these presents, the receipt whereof he doth hereby acknowledge, he, the said Thomas Collins, doth hereby consent and agree that he, the said Duke de Cadaval, shall be forthwith discharged from his said arrest, and shall not be taken or deemed liable to be taken again into custody by virtue of the aforesaid warrant or otherwise, except in execution; and the said Duke de Cadaval doth for himself, his executors and administrators, covenant, promise, and agree to and with the said Thomas Collins, his executors and administrators, that he will, within twelve days from the date hereof, give bail to the action, according to the form of the statute in such case provided, being in accordance with the tenor of an agreement entered into between the said parties, bearing date the 5th day of the said month of August (which agreement has been this day destroyed, but is to be held in full force and vigor by these presents) as follows, that is to say: "We, the undersigned," etc. [here the agreement of the 5th of August was set out.]

In witness whereof the said parties have hereunto set their hands, the day and year first above written.

DUQUE DE CADAVAL
THOMAS COLLINS.

The plaintiff, at the time of the execution of this agreement, paid 500*l.* to the defendant. The writ was set aside for irregularity by a judge at chambers, on the 30th of August, 1834. A rule *nisi* for setting aside the judge's order was obtained by the defendant in this court, but discharged in Michaelmas term, 1834; and no steps had since been taken in that action by the defendant against the plaintiff. No evidence was given, at the trial of the present cause, of any debt due from the plaintiff to the defendant; and it was proved that the latter had taken the benefit of the Insolvent Act in 1833, and that his schedule, though of a date later than the greater part of the claims set up by him in his first letter to the plaintiff, made no mention of any such claims. It was objected, for the defendant, that the money had been paid by the plaintiff voluntarily, and under an agreement between the parties, and with full knowledge of the facts, and could not, therefore, be recovered back in this action. The LORD CHIEF

¹ Sic.

JUSTICE directed the jury to find for the defendant, if they thought that he believed himself entitled to sue the plaintiff in the first action, but otherwise for the plaintiff. The jury found a verdict for the plaintiff, and stated it as their opinion that the defendant knew that he had no claim upon the plaintiff. In Easter term, 1835, *Platt* obtained a rule to show cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had.

Sir *John Campbell*, Attorney-General, *Kelly*, and *Alexander*, who were to have shown cause, were stopped by the court.

Platt and *Butt* in support of the rule.

LORD DENMAN, C. J. It is asserted that the principle of decision in *Marriott v. Hampton*¹ has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under the compulsion of legal process can never be recovered back; but only that, after the defence in an action has failed, and money has been recovered in the action, it cannot be recovered back in another action. This is the ground upon which the decision is put by Lord KENYON. He says, "After a recovery by process of law" — not extortion — "there must be an end of litigation." And GROSE, J., says, "It would tend to encourage the grossest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." The question there arose, not upon an extortion by legal process, but upon the want of means of defence in a previous action, which means a party ought to have when such action is brought. On the other hand, I certainly felt that there might arise, in this case, an inconvenience from our allowing the plaintiff's claim, since there may be another action for a malicious arrest. After the judgment in this case, there will nevertheless be no bar to that action. We must, however, see whether there be anything to defeat the plaintiff's right here, if the money be still his. For Mr. *Platt* has put the question in its true form: Is it still the plaintiff's money? How is it shown not to be so? Why, by striving to give effect to a fraud. That is the finding of the jury: the arrest was fraudulent; and the money was parted with under the arrest, to get rid of the pressure. This case differs from all which have been cited as being otherwise decided: in none of those was the *bona fides* negatived, not even in *Marriott v. Hampton*; ¹ for, in default of evidence to the contrary, the party there might have believed the debt to be due. But here the jury find that the defendant did know that he had no claim. The property in the money, therefore, never passed from the plaintiff, who parted with it only to relieve himself from the hardship and inconvenience of a fraudulent arrest.

LITTLEDALE, J. The case of *Marriott v. Hampton*¹ was different from the present. There the plaintiff in the original action claimed a debt, which the defendant asserted that he had paid, but he could not produce

¹ 7 T. R. 269.

the receipt; and, finding he could not defend, he paid the money and gave a *cognovit* for the costs. Afterwards he found the receipt; and sued, in order to recover back what he had paid. But, as the money had been originally recovered by legal proceedings, it was held that he could not recover it back as money had and received. That was the ground on which Lord KENYON and GROSE, J., proceeded. They considered that an action did not lie to recover back that which had once been recovered under a legal decision. But here there was no such recovery. The plaintiff was arrested; and the jury find that the arrest was merely colorable, and the money was paid for time to get bail. The arrest must have been merely colorable, since the debt was not inserted in the defendant's schedule. I admit the difficulty which arises from the liability of the defendant to an action for a malicious arrest: no doubt such an action would lie; for, as Collins knew that there was no debt, there is distinct malice. Still we cannot prevent the plaintiff from recovering back his money as money had and received.

PATTESON, J. I think this verdict was right. I put the matter entirely upon the special circumstances of the case. I admit, in general, that money paid under compulsion of law cannot be recovered back as money had and received. And, further, where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back. But here there is no *bona fides*, and on that I ground my opinion. When a man sues to recover back money paid under compulsion of law, it lies upon him to show that there was fraud. Has the plaintiff shown that here? The jury find that the arrest was fraudulent, in consequence, I suppose, of the debt not appearing in the schedule; for, if such a debt existed, the defendant was bound to insert it in the schedule, under the act of parliament; and the omission of it would have been a misdemeanor severely punishable. The jury, therefore, concluded that the defendant knew that the debt did not exist, and that he used the process colorably. To say that money obtained by such extortion cannot be recovered back, would be monstrous. Then the terms of the agreement form a very strong circumstance. The defendant, having a man in custody for a debt for which he knew that he had no claim, is to get the 500*l.*, whether he recover in the action or not; for there is no provision for the defendant refunding the money in case of his failure. Now suppose the plaintiff had put in bail to the sheriff, instead of entering into this agreement, what would the consequence have been? On application to my Brother ALDERSON the writ was cancelled, though perhaps on a paltry objection; but the result would have been, in the case supposed, that nothing would have got into the pocket of the defendant. It would be a scandal to the law if this money could not be recovered back.

COLERIDGE, J. I quite agree. Although the decisions have gone as far as they can go, yet I will not attempt to disturb them: and they are quite

consistent with the decision which we are now giving. It is clear that, if money be paid with full knowledge of facts, it cannot be recovered back. It is clear, too, that if there be a *bona fide* legal process, under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation. That is the substance of the decisions. But no case has decided that, when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law. If, indeed, the property were changed, it would follow that the plaintiff must fail; but the defendant's counsel assumed that. I rely on the position which is laid down in 1 Selwyn's *Nisi Prius*, 89,¹ "If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received." For this, *Astley v. Reynolds*² is cited, in which the circumstances of compulsion were much less strong than in the present case. My opinion, therefore, is founded upon the particular circumstances of the case. When it is said that we are not to look to the degree of hardship, so as to depart from the legal principle, I agree; but here the particular circumstances make the law of the case. Here is a foreigner, at a great distance from his friends, at a great distance from London, ignorant of the law of England (though I do not rely upon that), charged with owing a very large sum. Then, first, is not the payment compulsory? Next, is there *bona fides*? According to the finding of the jury, the defendant commits perjury, and uses legal process colorably to enforce an unjust demand. I should have been sorry to find that our hands were tied in such a case.

Rule discharged.

SOPHIA DE MEDINA v. GROVE.

IN THE QUEEN'S BENCH, FEBRUARY 14, 1846.

[*Reported in 10 Queen's Bench Reports, 157.*]

IN *De Medina* against *Grove*, the plaintiff sought to recover back from *Grove* the excess of the sum levied by the sheriff over the amount actually unsatisfied at the time of the execution. The declaration was in assumpsit for money had and received. Plea: *non assumpsit*. Particular of demand, claiming 324*l.* 1*s.* 5*d.*, being part of a sum of 325*l.* 1*s.* which defendant obtained from plaintiff by means of an execution issued by him on November 23, 1843. The pleadings in *De Medina v. Grove* and others,³ and the judgment of this court,⁴ make any further detail of the facts unnecessary.

¹ Assumpsit II. 8th Ed. 1831.

² 2 Str. 915.

³ 10 Q. B. 152.

⁴ 10 Q. B. 166.

On the trial, before Lord DENMAN, C. J., at the sittings in London after Hilary term, 1845, the plaintiff obtained a verdict for 324*l.* ; but leave was given to move for a nonsuit. *Watson*, in Easter term, 1845, obtained a rule to show cause why a nonsuit should not be entered, on the ground (taken at the trial) that an action for money had and received did not lie, the judgment being conclusive between the parties ; or why, if the verdict proceeded on a supposition of fraud practised on the plaintiff, a new trial should not be had, inasmuch as the verdict on this point (as well as in other respects) was against the evidence, no fraud having been proved. In Michaelmas term, November 10, 1845,

Shce, Serjt., *F. V. Lee*, with whom was *Allen*, Serjt., showed cause.

Watson and *Corrie*, *contra*.

Lord DENMAN, C. J. This was an action for money had and received, to recover the amount levied under the *fieri facias* mentioned in the second count of the declaration in the action upon the case upon which our judgment has just been given.

The plaintiff obtained the verdict : and the question is, whether money levied under a regular execution upon a regular judgment unsatisfied can be recovered back again as for money had and received to the plaintiff's use, upon the ground that the judgment has been partly satisfied, and that the execution, though for less than the amount recovered, is for more than is actually remaining due.

We are clearly of opinion that this action is not maintainable, and that the entire or partial validity of a judgment good upon the face of it cannot be inquired into in this form of action ; and that the only remedy in such a case is by application to the equitable jurisdiction of the court, or to a court of equity.

If such an action as the present would lie, great inconsistency might follow. The court might refuse, upon application, to interfere with the judgment or execution, and yet, if such an action could be brought, the defendant in the original action might recover the money levied, and so defeat both judgment and execution.

If there was any fraud in the case, that might be a ground for the interference of the court to set aside the judgment or the execution ; but, whilst both remain unreversed, it would be contrary to principle to reverse them in effect by an action to recover back the amount levied. No case was cited, nor are we aware of any that could be cited, to warrant such a proceeding ; and we are therefore of opinion that the rule should be absolute for a nonsuit.

Rule absolute for a nonsuit.

CLARK & CLARK v. PINNEY.

IN THE SUPREME COURT OF NEW YORK, AUGUST TERM, 1826.

[Reported in 6 Cowen, 297.]

ASSUMPSIT for money had and received, tried at the Onondaga Circuit, September, 1825, before THROOP, C., Judge.

It appeared by the N. P. record that the suit was commenced as early as February term, 1825. The declaration contained the usual money counts. Plea, *non assumpsit*, with notice of set-off.

On the trial, the plaintiffs' counsel offered in evidence the record of a judgment in the Onondaga Common Pleas of the term of February, 1822, in favor of the defendant against the plaintiffs, for \$193.11; a *fi. fa.* indorsed satisfied by the sheriff, June 21, 1822, except sheriff's fees; that the execution was paid by a note of Walker & Clark, by which they promised the defendant to pay him \$181.27 on the 1st day of February, 1823, with interest, provided the judgment in the Common Pleas should not be reversed before that day. That this was received as and towards payment of the judgment by Pinney and his attorney. The counsel also offered the record of a judgment for \$216.73 in the Onondaga Common Pleas on this note, recovered at May term, 1823, and an execution returnable at the next August term, which had been paid before the return day, and was returned by the sheriff satisfied. They also offered an exemplification of a judgment record in the Supreme Court in favor of the present plaintiffs against the present defendant, whereby it appeared that the judgment first above mentioned had been reversed on a writ of error, at the October term, 1824. All these facts were admitted by the defendant's counsel, on whose motion the judge nonsuited the plaintiffs, with leave to move to set aside the nonsuit, and for a new trial.

E. Griffin for the plaintiffs.

S. M. Hopkins, contra.

Curia, per SAVAGE, C. J. The important question in this case is, whether *indebitatus assumpsit* for money had and received lies to recover money paid on an execution upon a judgment which was afterwards reversed.

The general proposition is, that this action lies in all cases where the defendant has in his hands money which, *ex aquo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment, which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible, that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him. The only question is, whether this be the proper remedy.

The cases referred to by counsel do not fully decide the point; nor have I found any case where this very point has been decided except *Green v. Stone*.¹ It was raised in *Isom v. Johns*.² There the defendant had been plaintiff in a former action; recovered judgment, and issued execution, upon which the defendant's property was sold by the sheriff. On the argument, most of the English cases which are now cited were referred to. The court decided against the plaintiff on the ground that the money did not appear to have come to the defendant's use; not denying the doctrine, however, that, if the defendant had received the money, the plaintiff might recover it in this action.

In *Green v. Stone* this very point was decided in favor of the plaintiffs.

The principle in question is supposed to have been acted on in *Feltham v. Terry*,³ which was an action for money had and received by the churchwardens against the overseers of the poor, for money levied by the latter, on a conviction of one of the former, which was subsequently quashed. The court held the plaintiff might sue for the money collected by a sale of the property; or, by bringing trespass, he might have recovered the value of the property. This conviction, I apprehend, must have been irregular; otherwise the court would not have said trespass might have been brought. Trespass surely would not lie for collecting the amount of a judgment which was merely erroneous. In that case, therefore, the court must have acted on the principle that the money was collected by a void authority. The authorities are clear and abundant that, in such a case, *indebitatus assumpsit* lies. 1 Bac. Abr. 261; *Newdigate v. Davy*.⁴

In the case of *Mead v. Death & Pollard*,⁵ it was decided that money paid upon an order of the Quarter Sessions could not be recovered back, though the order had been quashed on *certiorari*. And TRACY, Baron, before whom the cause was tried, compared it to the case where money is paid upon a judgment which is afterwards reversed for error, in which case *indebitatus assumpsit* will not lie. No reason is given why this action will not lie; nor is any case referred to in support of the *dictum*. It is shown, however, that in the English courts the proper remedy, upon the reversal of a judgment, is a *scire facias quare restitutionem non*, upon which the party recovers all that he has lost by reason of the judgment.⁶ And if it appear on the record that the money is paid, restitution will be awarded without a *scire facias*.⁷

Cases have been cited in which it is said that this action does not lie to recover money collected under legal process afterwards vacated, which is true as applied to those cases; but the principle is not applicable in this case.

Upon the whole, my view of the question is this: the general principle

¹ 1 Har. & John. 405.

² 2 Munf. 272.

⁴ 1 Ld. Raym. 742.

⁶ Com. Dig. (3 B. 20.) Cro. Car. 699.

³ Loft, 207.

⁵ 1 Ld. Raym. 742.

⁷ 2 Salk. 588.

Remedy in
scire facias

of error, Triplett and Neale, on the 30th of August, 1824, sued out an execution against the Bank of Washington, and inclosed it to Richard Smith, cashier of the office of discount and deposit of the Bank of the United States at Washington, with the following indorsement:—

Triplett and Neale v. The Bank of Washington.

"Use and benefit of the office of discount and deposit U. States, Washington city." Chr. Neale. "Pay to Mr. Brooke Mackall." Rd. Smith, cashier. "Received eight hundred and eighty-one dollars and eighteen cents." B. Mackall.

B. Mackall, who was the runner in the branch bank, presented the execution to the Bank of Washington, and received the amount due thereon, on the 9th of September, 1824. At the time of receiving the same, William A. Bradley, cashier of the Bank of Washington, verbally gave notice to said Mackall, that it was the intention of the Bank of Washington to appeal to the Supreme Court, and that the said office of discount and deposit would be expected, in case of reversal of the judgment, to refund the amount. Mackall paid the money over to Smith, who entered it to the credit of Neale, one of the plaintiffs in the execution. Before the execution was sent to Smith, Neale had promised him to appropriate the money expected to be recovered from the Bank of Washington, to reduce certain accommodation discounts, which he had running in the office of discount and deposit. Smith, when he received the execution with the indorsement thereon, understood and considered that it was for collection, and the money when received by him was deposited to Neale's credit generally, and he would have sent the money to him at Alexandria if he had requested him so to do, or would have paid his check for the amount. Immediately on the receipt of the money, Smith wrote to Neale informing him thereof, and asking him for specific directions how to apply it; which letter Neale immediately answered, giving him directions, and the money was applied according to such directions.

Upon this statement of facts the court below gave judgment for the plaintiffs; to reverse which, the present writ of error has been brought.

That the Bank of Washington, on the reversal of the judgment of Triplett and Neale, is entitled to restitution in some form or manner, is not denied. The question is, whether recourse can be had to the Bank of the United States, under the circumstances stated in the case agreed. When the money was paid by the Bank of Washington, the judgment was in full force, and no writ of error allowed, or any measures whatever taken, which could operate as a *supersedeas* or stay of the execution. Whatever therefore, was done under the execution, towards enforcing payment of the judgment, was done under authority of law. Had the marshal, instead of the runner of the bank, gone with the execution and received the money, or coerced payment, he would have been fully justified by authority of the execution; and no declaration or notice on the part of the Bank of Wash-

ington of an intention to appeal to the Supreme Court would have rendered his proceedings illegal, or made him in any manner responsible to the defendants in the execution. Suppose it had become necessary for the marshal to sell some of the property of the bank to satisfy the execution, the purchaser would have acquired a good title under such sale, although the bank might have forbid the sale, accompanied by a declaration of an intention to bring a writ of error. This could not revoke the authority of the officer, and while that continued, whatever was done under the execution would be valid. It is a settled rule of law, that upon an erroneous judgment, if there be a regular execution, the party may justify under it until the judgment is reversed; for an erroneous judgment is the act of the court.¹ If the marshal might have sold the property of the bank and given a good title to the purchaser, it is difficult to discover any good reason why a payment made by the bank should not be equally valid, as it respects the rights of third persons. In neither case does the party against whom the erroneous judgment has been enforced, lose his remedy against the party to the judgment. On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias*; when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias* may be necessary, to ascertain what is to be restored.² And, no doubt, circumstances may exist where an action may be sustained to recover back the money.³ But as it respects third persons, whatever has been done under the judgment, whilst it remained in full force, is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment, during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed, it would virtually, in many cases, amount to a stay of proceedings on the execution. No such rule is necessary for the protection of the rights of parties. The writ of error may be so taken out as to operate as a *supersedeas*. Or, if a proper case can be made for the interference of a court of chancery, the execution may be stayed by injunction.

It is difficult whether
land or a man
shall enforce
pay of execution

x x

x x

^ ^

It has been argued, however, on the part of the defendants in error, that the Bank of the United States stands in the character of assignees of the judgment, and is thereby subjected to the same responsibility as the original parties, Triplett and Neale.

Without entering into the inquiry whether this would vary the case, as

¹ 1 Stra. 509; 1 Ver. 195.

² 2 Salk. 587, 588; Tidd's Prac. 936, 1137, 1138.

³ 6 Cow. 297.

What is meant is there was no assignment for use of the principal

to the responsibility of the plaintiff in error, the evidence does not warrant the conclusion that the Bank of the United States stands in the character of assignees of the judgment. There is neither the form or the substance of an assignment of the judgment. No reference whatever, either written or verbal, is made to it. The mere indorsement on the execution, "use and benefit of the office of discount and deposit of the United States, Washington city," cannot, in its utmost extent, be considered anything more than an authority to receive the money, and apply it to the use of the party receiving it. It is no more an assignment of the judgment than if the authority had been given by a power of attorney in any other manner, or by an order drawn on the Bank of Washington. The whole course of proceeding by the cashier of the office of discount and deposit, shows that he understood the indorsement on the execution merely as an authority to receive the money subject to the order of Neale, with respect to the disposition to be made of it. He did not deal with it as an assignee, having full power and control over the money, but as an agent, subject to the order of his principal. He passed it to his credit on the proper books of the office; and wrote to him, asking specific directions how the money should be applied. He received his directions, and applied it accordingly; and all this was done six months before the allowance of the writ of error.

It is said, however, that although Mr. Smith might have considered himself a mere agent to collect the money, the Bank of Washington had no reason so to consider him. There is nothing in the case showing that the Bank of Washington had any information on the subject, except what was derived from the indorsement on the execution; and if that did not authorize such conclusion, the plaintiff in error is not to be prejudiced by such misapprehension. It was a construction given to a written instrument, and if that construction has been mistaken by the defendant in error, it is not the fault of the opposite party.

But again, it is said the payment of the money was accompanied with notice of an intention to appeal to the Supreme Court; and that, in case of reversal, it would be expected that the office of discount and deposit would refund the money.

If the plaintiff in error could be made responsible by any such notice, given even in the most direct and explicit manner, that which was given could not reasonably draw after it any such consequence. It is vague in its terms, and does not assert that the office of discount and deposit would be held responsible to refund the money, but only that it would be expected that it would be done. This is not the language of one who was asserting a legal right, or laying the foundation for a legal remedy. And there is no evidence that even this was communicated to the office.

But the answer to the argument is, that no notice whatever could change the rights of the parties, so as to make the Bank of the United States

responsible to refund the money. When the money was paid, there was a legal obligation on the part of the Bank of Washington to pay it; and a legal right on the part of Triplett and Neale to demand and receive it, or to enforce payment of it under the execution. And whatever was done under that execution, whilst the judgment was in full force, was valid and binding on the Bank of Washington, so far as the rights of strangers or third persons are concerned. The reversal of the judgment cannot have a retrospective operation, and make void that which was lawful when done. The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost, by reason of the erroneous judgment; and as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right; but as to strangers there is no such privity: and if no legal right existed when the money was paid, to recover it back, no such right could be created by notice of an intention so to do. Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake.

The judgment must accordingly be reversed; and judgment entered for the defendant in the court below.

JONATHAN C. STEVENS v. GERSHOM M. FITCH AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER
TERM, 1846.

[Reported in 11 Metcalf, 248.]

ASSUMPSIT to recover \$709.89, money had and received by the defendants to the use of the plaintiff. At the trial before DEWEY, J., the following facts appeared in evidence:—

The defendants, in 1840, recovered judgment, in the Court of Common Pleas, against Stephen Stevens, for damages and costs of suit, on a complaint against him for flowing their lands by means of a mill dam. Execution issued on that judgment, and was levied, on the 9th of March, 1841, upon said Stephen's real estate. On the 1st of March, 1842, the plaintiff paid the defendants \$709.89, and they gave him a receipt for that sum, "in full of an execution against Stephen Stevens." Said Stephen died in 1842.

Full case
At the September term of this court, in 1845, the aforesaid judgment of the Court of Common Pleas was vacated, on a writ of *certiorari* brought by the administrator of said Stephen's estate. See 7 Met. 605.

Account of Fitch
The defendants insisted that the cause of action, if any, accrued to said Stephen, and that an action for the recovery of said \$709.89 could be maintained only by his administrator, and that there was no such privity between the defendants and the plaintiff, as entitled him to maintain this action.

Fitch was real owner of the mill & dam. Taken only nominal owner.
The plaintiff showed that he was the sole party in interest, and that, although the proceedings on the complaint for flowing the defendants' lands were nominally against Stephen Stevens, on whose land the said mill-dam was erected, yet that the mill, which was carried by the water raised by said dam, was owned by the plaintiff, and was on his land; that the plaintiff had assumed all the responsibility, and that this was known to the defendants; and that the plaintiff had given a bond to said Stephen to save him harmless from all damages and costs that might be recovered against him on the defendants' aforesaid complaint.

The case was taken from the jury, under an agreement of the parties that if it would have been competent for the jury to find a verdict for the plaintiff, and if the court would have sustained such verdict, then the defendants should be defaulted; but that the plaintiff should become nonsuit, if he is not, in the opinion of the court, entitled to recover in this action.

Barnard and Sumner for the plaintiff.

Bishop for the defendants.

WILDE, J. We are clearly of opinion that a verdict for the plaintiff would be well maintained by the evidence, and that a verdict for the defendants could not be sustained upon the facts proved, as to which there is no conflicting evidence.

Fitch was real owner of the mill & dam. Taken only nominal owner.
The only defence relied on is, that there is no privity of contract between the present parties, and that the action should have been brought in the name of Stephen Stevens's administrator. But there is no ground for this defence. The money now sued for was paid by the plaintiff, not as the agent or attorney of Stephen Stevens, who was only a nominal party. The plaintiff was the sole party in interest, and he paid the money, on his own account, which he was obliged to pay, on a consideration which has failed; and this shows a privity of contract implied by law. In the cases cited in support of the defence, it appeared that the money paid was paid by an agent. The contrary is proved in the present case; for the plaintiff paid his own money, and in no sense can he be considered as the agent of Stephen Stevens. Judgment for the plaintiff would be a good bar to an action by the administrator of Stephen Stevens.

Defendants defaulted.

Over

MALCOLM CHANDLER v. SAMUEL SANGER AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1874.

[Reported in 114 Massachusetts Reports, 261.]

CONTRACT for money had and received. At the trial in the Superior Court, before ROCKWELL, J., the plaintiff, in opening his case, stated that he expected to prove that the plaintiff was a dealer in ice, and furnished ice each week-day to parties in Boston, under contracts to furnish a certain amount daily, upon all week days; that his custom was to have his carts loaded by twelve o'clock on Sunday night, in order to start early Monday morning; that any failure on the part of the plaintiff to furnish his customers with ice on Monday would be a great injury to him; that Monday morning, July 12, 1869, he had standing in his sheds at Brighton, adjoining his ice-house, five heavy two-horse teams loaded with ice, ready to start for Boston before light; that the defendant Sanger held his promissory note and had proved it against his estate in insolvency; that in the insolvency proceeding he had obtained his discharge; that the defendants knew these facts; that the defendant Sanger and the other defendant, who was an attorney-at-law, brought an action on this promissory note, under circumstances which would satisfy the jury that the action was commenced and carried on by them fraudulently, with the purpose of extorting money from the plaintiff by duress, under color of legal process; that in pursuance of this purpose, they went about two o'clock on Monday morning with a writ in the hands of an officer and made an attachment of the carts, horses, and harnesses; that the attorney-at-law, who had been with the officer in making the attachment, went to the plaintiff's house and informed him of the attachment, and told him that none of the property so attached could go to Boston unless the claim should first be settled by the payment of \$300; that the plaintiff told the attorney that he did not owe anything, and said he would dissolve the attachment by giving a bond; that the attorney then told him that it would take three days to dissolve it, and that for that time the property would be held under it, and that his discharge in insolvency did not cut off the claim; that the plaintiff believed these statements, and being ignorant of the method of dissolving attachments and being in fear of great loss in his business, to relieve the property from attachment he paid the \$300 to the attorney under protest, stating that he should claim and enforce his rights, and recover back the money.

The presiding judge being of the opinion that these facts, if proved, would not sustain the action, so ruled; whereupon, by consent of the parties, he reported the case to this court for their decision. It was agreed that if the court should be of opinion that these facts, if proved, were

sufficient to sustain the action, then it was to stand for trial; otherwise judgment was to be entered for the defendants.

G. Stevens and J. F. Colby for the plaintiff.

T. H. Sweetser, J. W. Hammond with him, for the defendants.

GRAY, J. This is not an action of tort, to recover damages for malicious prosecution, or abuse of legal process, but an action of contract, in the nature of assumpsit, for money had and received by the defendants, which they have no legal or equitable right to retain as against the plaintiff. Although the process sued out for the defendant was in due form, yet if, as was offered to be proved at the trial, he fraudulently, and knowing that he had no just claim against the plaintiff, arrested his body or seized his goods thereon, for the purpose of extorting money from him, then, according to all the authorities, the payment of money by the plaintiff, in order to release himself or his goods from such fraudulent and wrongful detention, was not voluntary, but by compulsion; and the money so paid may be recovered back, without proof of such a termination of the former suit as would be necessary to maintain an action for malicious prosecution. *Watkins v. Baird*; ¹ *Shaw, C. J., in Preston v. Boston*; ² *Benson v. Monroe*; ³ *Carew v. Rutherford*; ⁴ *Richardson v. Duncan*; ⁵ *Sartwell v. Horton*. ⁶ *GIBSON, C. J., in Colwell v. Peden*; ⁷ *Cadaval v. Collins*; ⁸ *PARKE, B., in Oates v. Hudson*, ⁹ and in *Parker v. Bristol & Exeter Railway Co.* ¹⁰

New trial ordered.

Sum no case 377 Court

JOHN B. SCHOLEY, EXECUTOR, *et al.*, RESPONDENTS, v. WILLIAM L. HALSEY, EXECUTOR, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 19, 1878.

[Reported in 72 *New York Reports*, 578.]

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department in favor of plaintiff, entered upon an order overruling exceptions and directing judgment upon a verdict.

This action was brought originally against George Hart Mumford and Anne E. Mumford to recover a sum of money, upon grounds stated in the complaint substantially as follows: On the 10th of September, Elizabeth G. Scholey died, leaving a will, under which the plaintiff, one Worcester, and George H. Mumford were appointed her executors. Worcester was removed, and Mumford died September 30, 1871, leaving a will, of which

¹ 6 Mass. 506.

⁴ 106 Mass. 1, 11, *et seq.*

⁷ 3 Watts, 327, 328.

² 12 Pick. 7, 14.

⁵ 3 N. H. 503.

⁸ 4 A. & E. 858.

¹⁰ 6 Ex. 702, 705.

³ 7 Cush. 125, 131.

⁶ 28 Vt. 370.

⁹ 6 Ex. 346, 348.

the said George Hart Mumford and Anne E. Mumford were the executors. At the time of his death he had in his possession as executor of Mrs. Scholey certain United States bonds, and these came into the hands of his executors as such; the plaintiff demanded the bonds, and afterwards (November 8, 1871), obtained an order from the surrogate of Monroe county, requiring one of them (George Hart Mumford) "forthwith to deliver the bonds to the plaintiff." Defendants refused to do so, alleging that commissions were due to the estate of George H. Mumford, and that those should be first paid. This claim was disputed by the plaintiff; and thereupon the surrogate having jurisdiction of the matter of said accounts decided in favor of the claim, and adjudged that they were as such executors entitled to the money claimed in this action, as upon payment over by George H. Mumford of said bonds in his lifetime. That the plaintiff thereupon paid the money and received the bonds. The surrogate afterwards reversed his decision as erroneous "in matter of law." The complaint then alleges "that before the commencement of this action a demand was made upon the said defendants in his behalf for said sum of \$474.77, which was refused." A judgment was asked against them for the amount.

The answer denies that the defendants refused to give up the bonds, but on "the contrary agreed and offered to deliver them up" upon the payment of such sums as should, upon accounting before the surrogate, be found due to the estate of the deceased executor, George H. Mumford; that the claim for commissions was submitted to the surrogate, who determined the amount due for commissions, "and thereupon plaintiff called upon defendants" and paid them "the amount so determined, and the defendants thereupon delivered up said bonds." The case has been to this court twice before the present appeal. (See 60 N. Y. 498 : 64 id. 521.) Between the second trial and the decision in this court, George Hart Mumford died, and the action was continued against Anne E. Mumford, as survivor. She subsequently died, and the action was revived and continued against her executor, the present defendant. Upon trial it appeared that the demand for a return of the sum paid was made of George Hart Mumford; the facts were proved substantially as alleged in complaint. Defendant's counsel moved to dismiss the complaint, on the ground that plaintiff could not maintain the action against the present defendant, which motion was denied, and said counsel duly excepted. Said counsel moved for a nonsuit upon the ground, among others, that no demand for repayment of the money was made of Mrs. Mumford. The motion was denied, and said counsel duly excepted. The court directed a verdict for plaintiff.

Geo. F. Danforth for appellant.

W. F. Cogswell for respondent.

ANDREWS, J. If it was necessary in this case to decide the question whether the original defendants, having received the money claimed in this action under and by virtue of the decision of the surrogate, made in a

matter within his jurisdiction, could be considered as having obtained it by duress, the question would deserve serious consideration before deciding it for the plaintiff. The plaintiff paid the money and the defendants received it, after the surrogate had decided, upon a hearing of all the parties, that the defendants were entitled to it.

Both parties, after the decision, maintained their original position; the plaintiff claiming that the decision of the surrogate was erroneous, and that the defendants were not entitled to the commissions; and the defendants insisting that they were entitled to them, and that the surrogate's decision was correct. The plaintiff while this decision was in full force paid the commissions. The defendants were justified in receiving them, by the decision of the surrogate. Can it be said, under such circumstances, that they received them wrongfully, or that they obtained them by duress, although the plaintiff paid them to obtain possession of the bonds? But we pass this point without further observation, as we think the case is with the plaintiff on the ground now to be stated.

The original decision of the surrogate was doubtless erroneous, and having been subsequently reversed and set aside, the plaintiff was then entitled to recover the money paid under the erroneous order. In *Clark v. Pinney*,¹ the court says: "That this action (*indebitatus assumpsit*) lies in all cases where the defendant has in hands money which, *ex æquo et bono*, belongs to the plaintiff. When money is collected upon an erroneous judgment which subsequent to the payment of the money is reversed, the legal conclusion is irresistible, that the money belongs to the person from whom it was collected; of course he is entitled to have it returned to him." The same principle is recognized in subsequent cases. *Maghee v. Kellogg*,² *Garr v. Martin*.³

And it is not necessary in order to maintain the action, that the payment should have been coerced by execution. It is sufficient if it was paid after judgment or adjudication made. 1 Stark. N. P. 326, 357; *Lott v. Swezey*.⁴ The original defendants were bound, therefore, to restore to the plaintiff the money received under the erroneous decision of the surrogate. But a demand before bringing suit was necessary in order to enable the plaintiff to recover upon this view of the case. If the original defendants are to be regarded as joint-debtors, and jointly responsible to the plaintiff, the demand made of George Hart Mumford would seem to have been sufficient to sustain the action against both. *Geisler v. Acosta*; ⁵ *Blood v. Goodrich*; ⁶ *Baird v. Walker*; ⁷ Com. Dig. tit. Condition L., 9.

The action was brought against the original defendants as individuals, and not in their representative capacity as executors of George H. Mumford; and the complaint alleges that the money sought to be recovered was paid

¹ 6 Cow. 299.

² 24 Wend. 32.

³ 20 N. Y. 306.

⁴ 29 Barb. 87.

⁵ 9 N. Y. 227.

⁶ 9 Wend. 68.

⁷ 12 Barb. 298.

to the defendants, and a personal judgment was demanded against them. The defendants, in their answer, allege that the plaintiff "called upon the defendants and paid them" the money in question. We think the pleadings conclude the defendants from now raising the question that the defendants did not receive the money as individuals, and that the action could not be maintained against them personally to recover it. They had no right to take any charge or control of the bonds, as executors of George H. Mumford.¹

The suit was properly revived against the executor of the survivor of the original defendants. *Union Bank v. Mott*.²

The judgment should be affirmed.

All concur.

Judgment affirmed.

EXALL v. PARTRIDGE AND TWO OTHERS.

IN THE KING'S BENCH, JUNE 8, 1799.

[*Reported in 8 Term Reports, 308.*]

THIS was an action upon promises for money paid, laid out, and expended for the use of the defendants. At the trial before Lord KENYON at the sittings after last term, it appeared in evidence that the three defendants were lessees of certain premises by deed from one Welch, to whom they thereby covenanted to pay the rent, and that two of the defendants afterwards with the plaintiff's knowledge assigned their interest to Partridge the other co-lessee, who was a coachmaker; subsequent to which assignment the plaintiff put his carriage upon the premises under the care of Partridge, where it was taken as a distress by Welch the landlord for rent in arrear; and the plaintiff, in order to redeem it, was obliged to pay the rent due, taking at the time a receipt from Welch's attorney as for so much received on account of the three defendants. The present action was brought to recover that sum. The plaintiff was nonsuited, on the ground that the action should have been brought against Partridge alone, he being the person in the sole possession of the premises at the time, with the knowledge of the plaintiff, who had trusted him only with the possession of his property, and he also being the person ultimately responsible to the other two defendants; and therefore it was said that the money must be taken to have been paid for his use only.

Garrow obtained a rule, calling on the defendants to show cause why the nonsuit should not be set aside.

Eyres showed cause.

Garrow and *Espinasse* in support of the rule.

Lord KENYON, C. J. Some propositions have been stated on the part of

¹ 2 R. S. 449, § 11.

² 27 N. Y. 633.

None in ground that the right to have used Partridge alone being in some

the plaintiff to which I cannot assent. It has been said that, where one person is benefited by the payment of money by another, the law raises an assumpsit against the former: but that I deny; if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my creditor, *volens volens*. Another proposition was that the assignment from two of the defendants to the third was not evidence against the plaintiff, because he was no party to it: that also I deny; it surely was evidence to show in what relation the parties stood to this estate. I admit that where one person is surety for another, and compellable to pay the whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal. But none of those points affect the present question. As the plaintiff put his goods on the premises knowing the interests of the defendants, and thereby placed himself in a situation where he was liable to pay this money without the concurrence of two of the defendants, I thought at the trial that it was money paid to the use of the other defendants only; but on that point I have since doubted, and I rather think that the opinion I gave at the trial was not well founded.

GROSE, J. The question is, whether the payment made by the plaintiff under these circumstances were such an one from which the law will imply a promise by the three defendants to repay; I think it was. All the three defendants were originally liable to the landlord for the rent; there was an express covenant by all, from which neither of them was released; one of the defendants only being in the occupation of these premises the plaintiff put his goods there, which the landlord distrained for rent, as he had a right to do; then for the purpose of getting back his goods he paid the rent to the landlord which all the three defendants were bound to pay. The plaintiff could not have relieved himself from the distress without paying the rent; it was not therefore a voluntary, but a compulsory, payment; under these circumstances the law implies a promise by the three defendants to repay the plaintiff. And on this short ground I am of opinion that the action may be maintained.

LAWRENCE, J. One of the propositions stated by the plaintiff's counsel certainly cannot be supported, that whoever is benefited by a payment made by another is liable to an action of assumpsit by that other; for one person cannot by a voluntary payment raise an assumpsit against another. But here was a distress for rent due from the three defendants; the notice of distress expressed the rent to be due from them all; the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion; therefore I am of opinion that this action may be maintained against the three defendants. The justice of the case indeed is that the one who must ultimately pay this money should alone be answerable

here: but as all the three defendants were liable to the landlord for the rent in the first instance, and as by this payment made by the plaintiff all the three were released from the demand of the rent, I think that this action may be supported against all of them.

LE BLANC, J. Not having been in court when this motion was first made, I have not formed on the sudden a decisive opinion upon this case. But at present the inclination of my opinion is, that this action may be maintained against the three defendants, on this ground: the three defendants were all by their covenant bound to see that the rent was paid; by their default in not seeing that it was paid the plaintiff's goods were distrained for a debt due from the three defendants to Welch; by compulsion of law he was obliged to pay that debt; and therefore I think he has his remedy against the three persons who by law were bound to pay, and who did not pay, this money.

Rule absolute.

GRIFFINHOOFÉ v. DAUBUZ.

IN THE EXCHEQUER CHAMBER, NOVEMBER 29, 1855.

[Reported in 5 Ellis & Blackburn, 746].

THE first count of the declaration alleged that defendant, by deed dated 27th October, 1845, demised a farm in Sussex to plaintiff, from 29th September, 1845, for the term of twenty-one years, determinable as therein mentioned. That plaintiff entered and was possessed till the demise was determined on Michaelmas day, 1852, according to the provisions of the deed. The count then stated a breach of a covenant as to taking straw at a valuation.

Second count. That, after the determination of the term as in the first count mentioned, to wit, 1st October, 1852, "a certain sum of money, to wit, 41*l.* 12*s.* 10½*d.*, became and accrued due and payable from the defendant to certain persons; that is to say, to the Ecclesiastical Commissioners for England and Wales, for and in respect of a certain sum or rent in lieu and stead of tithes, or a tithe rent charged upon the said farm and land in the said first count mentioned; which said sum or rent the defendant as owner of the said farm, and entitled to the rents and profits thereof, was liable to pay, and ought to have paid; and which said farm and land was liable to the payment of the said sum or rent, as he the defendant well knew. And, the defendant having neglected and refused to pay the said sum, and the same being in arrear and unpaid as aforesaid, that is to say, on" 1st June, 1853, "the said Ecclesiastical Commissioners, by their bailiff, duly authorized in that behalf, for obtaining payment of the same duly, and according to the provisions of the statutes in that behalf, distrained

for the said sum so in arrear a certain stack of wheat of the plaintiff, then lawfully being upon the said farm and land; and afterwards, in pursuance of the provisions of the said statutes, sold and disposed of the said stack of wheat for and in satisfaction of the said sum so in arrear and the costs and charges of the said distress. By reason of which premises the plaintiff lost and was deprived of the said stack of wheat. And, although the defendant had notice of the several matters in this count mentioned, and was requested by the plaintiff to indemnify the plaintiff against the said seizure and sale, and to make good to him the loss so occasioned, yet the defendant has not indemnified the plaintiff, or made good to him the loss so occasioned, but has neglected and refused so to do."

Third count, for money paid.

Fourth count, on accounts stated.

Pleas. (1) As to 1st count and part of 3d and 4th counts, payment of money into court; (2) As to the residue of 3d and 4th counts, *Nunquam indebitatus*; (3) As to the same residue, Payment; (4) "As to so much of the second count of the declaration as alleges that the defendant was liable to pay, and ought to have paid, the sum or tithe rent in that count mentioned," "that the defendant was not liable to pay, nor ought he to have paid, the said sum or tithe rent, or any part thereof, as alleged;" (5) To the 2d count, "that the said stack of wheat therein mentioned was not lawfully upon the said farm and land as alleged;" (6) To the 2d count, "that the said stack of wheat therein mentioned was not, at the time when the same was so distrained as therein alleged, or at any time after the determination of the said term, lawfully on the part of the said farm and land where the same was so distrained."

The plaintiff took the money out of court; and issue was joined on the 2d, 3d, 4th, 5th, and 6th pleas.

A verdict was found: on the 2d plea, for plaintiff; on the 3d plea, for defendant; on the 4th plea, for defendant; on the 5th plea for plaintiff; on the 6th plea for plaintiff.

Judgment was entered up in the Court of Queen's Bench: "that the plaintiff take nothing by his said writ, except the said" sum paid into court and his costs in that behalf; "and that the defendant do go thereof without day, except as aforesaid; and that the defendant do recover against the plaintiff" his costs of defence, after allowing the plaintiff's said costs.

The plaintiff, in the Court of Exchequer Chamber, suggested error; which the defendant denied.

The case was argued in the preceding term.¹

Bramwell, for the party suggesting error.

Bovill, *contra*.

Cur. adv. vult.

¹ November 16th. Before WILLIAMS and CROWDER, JJ., and PARKE, ALDERSON, and PLATT, BB.

PARKE, B., now delivered the judgment of the court.

The point which was decided in the Court of Queen's Bench¹ is not now raised. That court quite rightly considered that the issue taken by the 4th plea involved a personal liability, and was not satisfied by the existence of a mere charge on the land; and they considered that no such personal liability existed, and therefore directed the verdict on this issue to be entered for the defendant. The allegation, therefore, which is traversed may be considered as off the record; and the question for us is, what is to be done with the record so modified.

It is argued that enough remains untraversed to entitle the plaintiff to judgment; and that, there being also other traverses to the same count, which are found for the plaintiff, the plaintiff, according to *Negelen v. Mitchell*,² would be entitled to judgment. But the question is, whether enough does remain.

The allegation, that the defendant well knew that the farm and land were liable to the payment is clearly not enough. Then there is an allegation that the stack was lawfully on the farm. Does that raise an implied promise, or require the defendant to indemnify the plaintiff for the loss which he has suffered by his stack being distrained and sold? We all agree that no such liability arises. There may be many cases in which the stack would be lawfully on the farm, and yet the defendant would not be bound to indemnify the plaintiff for the distress. One case may be put, which seems in fact to have been shown at the trial to have actually occurred: the plaintiff may have had permission to leave the stack on the farm for his own convenience. Something seems to have been said, at earlier stages of the case, as to this having been allowed on the terms of the plaintiff paying the rent-charge which accrued next after the expiration of the term. Supposing that to be so, there would be no implied undertaking by the defendant to repay the plaintiff the value of the stack distrained; the stack would, in such a case, be lawfully on the land; but the payment of the rent ought to come from the plaintiff himself. Again, it is quite consistent with this count that a new term may have been granted to a stranger, who has given permission to the plaintiff to keep his stack on the farm. That could raise no obligation on the part of the landlord. Again, we might suppose that the stack was on a cart which was passing over the premises in exercise of a right of way. There is therefore no allegation showing any privity entitling the plaintiff to recover in any form of action.

Judgment affirmed.

¹ *Griffinhoofe v. Daubuz*, 4 El. & Bl. 230.

² 7 M. & W. 612.

Fact that stack was in fact lawfully on the land does not make defendant liable to pay for distress of goods.

ENGLAND v. MARSDEN.

IN THE COMMON PLEAS, APRIL 23, 1866.

[*Reported in Law Reports, 1 Common Pleas, 529.*]

THIS was an action for money lent, money paid, interest, and money due upon accounts stated.

First plea, never indebted.

The cause was tried before MONTAGUE SMITH, J., at the sittings in Middlesex after last Michaelmas term. The facts material to the present question were as follows: On the 2d of June, 1860, the defendant, in consideration of a past debt of 100*l.*, and a present advance of 80*l.*, by bill of sale assigned to the plaintiff all the household furniture, goods, etc., upon the messuage and premises known as the Gospel Oak, Circus Road, Kentish Town, subject to redemption on payment of the 180*l.* by weekly instalments of 3*l.* 10*s.* each; the whole to become due upon default in payment of any one weekly instalment, and the plaintiff to be at liberty in that event to take possession and sell the goods, etc. On the 9th of July, 1860, the defendant was arrested, and he afterwards obtained his discharge under the Insolvent Debtor's Act, 1 & 2 Vict. c. 110. On the 10th of July, 1860, the plaintiff took possession under the bill of sale, but allowed the goods to remain upon the premises, and the defendant's wife and family to reside there and carry on the business until the 23d of October, when the landlord distrained for a quarter's rent which became due on the 29th of September. On the 26th of October the plaintiff paid the quarter's rent, and 6*l.* 9*s.* for expenses, which sums (amongst others) he now sought to recover from the defendant in this action as a payment made to release his goods from a claim for which the defendant was legally responsible.

In answer to a question put to them by the learned judge, the jury found that the plaintiff had no express authority from the defendant to keep the goods upon the premises; and, under his direction, a verdict was found for the plaintiff for 8*l.* 4*s.* 6*d.*, and leave was reserved to him to move to increase it by the sum of 42*l.* 9*s.*

Montagu Chambers, Q. C., accordingly obtained a rule *nisi*, relying upon the case of *Exall v. Partridge*.¹

H. T. Cole showed cause.

Montagu Chambers, Q. C., and Butt in support of the rule.

ERLE, C. J. I am of opinion that this rule should be discharged. The facts are these: The plaintiff having, on the 10th of July, 1860, taken possession of certain goods in the defendant's house under a bill of sale,

¹ 8 T. R. 308.

allowed them to remain upon the premises until after the 29th of September, on which day a quarter's rent became due. The landlord afterwards distrained for the rent, and the plaintiff freed his goods from that distress by payment of the sum claimed, and now seeks to recover it back from the defendant as money paid for his benefit and at his request. The proposition which has been contended for on the part of the plaintiff is, that where the owner of goods places them upon the premises of another, and rent becomes due, and the landlord distrains the goods, and the owner pays the landlord's claim in order to release his goods, the payment so made is a payment made under compulsion of law, and may be recovered in an action against the tenant; and for this Exall v. Partridge¹ is relied on. There is, however, one great distinction between that case and this. There, Partridge was a coachmaker, and Exall at his request bailed his carriage with him. The landlord distrained it for rent, and Exall cleared it from that burthen by paying the sum claimed; and it was held that the action lay, because the carriage was left upon the defendant's premises at the defendant's request and for his benefit. Here, however, the plaintiff's goods were upon the defendant's premises for the benefit of the owner of the goods, and without any request of the defendant. The plaintiff having seized the goods under the bill of sale, they were his absolute property. He had a right to take them away; indeed it was his duty to take them away. He probably left them on the premises for his own purposes, in order that he might sell them to more advantage. At all events, they were not left there at the request or for the benefit of the defendant. It is to my mind precisely the same as if he had placed the goods upon the defendant's premises without the defendant's leave, and the landlord had come in and distrained them.

BYLES, J. I am of the same opinion. The case is clearly distinguishable from Exall v. Partridge,¹ which has been recognized often. As I collect the facts, the payment was exclusively for the advantage of the plaintiff, and in no degree for that of the defendant. There is no evidence of any request on the defendant's part. The leaving the goods upon the premises was the plaintiff's own act, for his own advantage. There is nothing from which the law can imply a promise to pay.

KEATING, J. I am of the same opinion. The case of Exall v. Partridge,¹ which is plainly distinguishable from this, is an illustration of the rule of law, that, where one man is compelled to pay a debt for which another is legally responsible, the law will imply a promise by the latter to indemnify the former. But here the plaintiff was not compelled to pay the rent within the meaning of that rule, because he voluntarily and for his own advantage allowed the goods to remain upon the premises whilst the rent was accruing. We do not, therefore, in any degree, impugn the rule which has been referred to.

¹ 8 T. R. 308.

MONTAGUE SMITH, J. I am of the same opinion. The facts obviously distinguish this case from *Exall v. Partridge*.¹ The plaintiff by his own voluntary act, and without any request of the defendant, express or implied, placed his goods in a position to enable the landlord to seize them. He probably thought it would be more to his own advantage if he allowed the goods to remain upon the premises until a new tenant was obtained, inasmuch as they would in that case command a better price. He was not ignorant of the accruing claim of the landlord. The jury found that he had no express authority from the defendant to leave the goods on the premises. If the defendant had been asked, in all probability he would have declined to give such authority. This, moreover, is a very stale claim.

Rule discharged.

EDMUNDS v. WALLINGFORD.

IN THE COURT OF APPEAL, MARCH 18, 1885.

[Reported in *Law Reports*, 14 *Queen's Bench Division*, 811.]

ACTION upon an agreement dated the 8th of May, 1879, and in the alternative for money received, and in the alternative for money paid. At the trial before HUDDLESTON, B., without a jury, the learned judge gave judgment for the plaintiff for 1200*l.*, and the defendant appealed.

The facts of the case are stated in the judgment of the Court of Appeal hereinafter set forth.

A. R. Jelf, Q. C., and *Johnston Watson*, C. *Johnston Edwards* with them, for the plaintiff.

Finlay, Q. C., and *W. Baugh Allen*, for the defendant.

Cur. adv. vult.

The following written judgment of the court (Lord COLERIDGE, C. J., Sir JAMES HANNEN, and LINDLEY, L. J.) was delivered by

LINDLEY, L. J. The plaintiff in this action is the trustee in bankruptcy of two sons of the defendant, and the action is brought to recover 1200*l.* promised by the defendant to be paid to the plaintiff, as such trustee, and in the alternative the plaintiff claims 1300*l.*, the sum realized by the sale of goods belonging to the sons, but seized and sold under a judgment recovered against the defendant. The defendant alleges that there was no consideration for his promise to pay the 1200*l.*, and that the goods seized were his own goods and not those of his sons.

In order to understand this controversy, it is necessary to state the circumstances which led to it. They were shortly as follows:—

In April, 1876, the defendant bought the business of an ironmonger in Andover in his own name, but for his son William. The greater part of

¹ 8 T. R. 308.

the purchase-money was paid by the defendant. The lease of the place where the business was carried on was taken in his name; his wife lived on the place; he came there every week, and assisted more or less in the business, and the banking account of the business was kept in his name, and he alone drew checks on that account.

In August, 1876, the defendant's sons, William and Edward, carried on the business as partners under the name of Wallingford Brothers; but the defendant continued to visit the place and to keep the banking account as before, the business checks being signed by him in the name of the firm.

From March, 1878, to September, 1878, the defendant lived at the place. In the autumn of 1878 an action was brought against the defendant by the Mutual Society, and in October, 1878, judgment was signed against him. On the 24th of October, 1878, the goods on the premises where the business was carried on were seized. The sons claimed them; but upon an interpleader summons taken out by the sheriff the claim was, on the 11th of November, 1878, barred, and the goods seized were accordingly sold. They realized 1300*l.*, and this sum has been paid into court in the action of Mutual Society *v.* Wallingford as a security for what may be found due from the defendant to the society upon taking certain accounts directed to be taken in that action.¹ On the 28th of November, 1878, the sons were adjudicated bankrupt. The plaintiff is their trustee, and on the 8th of May, 1879, the defendant entered into the agreement sued upon in the present action. The agreement is as follows:—

“I, John Wallingford, of 22 Chelsea Road, Southsea, hereby agree with Henry William Edmunds, of 4 Summer Row, Birmingham, as trustee in the bankruptcy of my sons William, John, and Edward, that in consideration of their ironmongery stock in and about their shop and premises at High Street, Andover, having been seized and sold on behalf of the Mutual Society of Ludgate Hill, London, in payment of an alleged claim against me, I undertake and agree that in the event of my succeeding in an action I am about to bring against the said Mutual Society, to pay all the trade creditors of my sons for debts contracted while in business at High Street, Andover, in full, through the trustee, Henry William Edmunds; and further, I agree that whether my said action against the Mutual Society is successful or not, I will pay three hundred pounds per annum to the said trustee until I shall have paid him a sufficient sum to pay the trade-creditors of my aforesaid sons in full.”

Such being the facts, it is necessary to consider the legal questions to which they give rise.

The first question is the liability incurred by the defendant to his sons by reason of the seizure of what he has deliberately asserted to be their goods for his debt. That, as between the father and the sons, the goods were theirs, we consider established by the father's own statements. Speak-

¹ See Wallingford *v.* Mutual Society, 5 App. Cas. 685.

ing generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor.

The authorities supporting this general proposition will be found collected in the notes to *Lampleigh v. Brathwait*,¹ and *Dering v. Winchelsea*.² As instances illustrating its application, reference may be made to the case of a person whose goods are lawfully distrained for rent due from some one else, as in *Exall v. Partridge*;³ to the case of a surety paying the debt of his principal; to the case where the whole of a joint debt is paid by one only of the joint debtors; to the case where the joint property of a firm is seized for the separate debt of one of the partners. The right to indemnity or contribution in these cases exists, although there may be no agreement to indemnify or contribute, and although there may be, in that sense, no privity between the plaintiff and the defendant: see *Johnson v. Royal Mail Steam Packet Co.*⁴ But it is obvious that the right may be excluded by contract as well as by other circumstances. Where the owner of the goods seized is, as between himself and the person for whose debt they are seized, liable to pay the debt, it is plain that the general rule is inapplicable; and this explains the case of *Griffinhoofe v. Daubuz*.⁵ There the plaintiff, who was the tenant of the defendant, sued him to recover the value of a stack of wheat distrained for tithe rent-charge. The declaration alleged that the defendant was liable to pay, and ought to have paid, this rent-charge. The defendant, on the other hand, denied this alleged liability; and upon this part of the case the verdict was entered for the defendant, and the defendant succeeded in the action. The plaintiff, without attempting to disturb the verdict, applied for judgment *non obstante veredicto*, for alleged error on the record, on the ground that although the defendant was not personally liable to pay the rent-charge, yet his farm and land were liable to pay it, and therefore he ought to indemnify the plaintiff. But it was held that many circumstances might exist rendering the plaintiff the person to pay the tithe rent-charge, and that, having regard to the verdict, the record did not show that the defendant was liable to indemnify the plaintiff against it. The court said: "There is no allegation of any privity entitling the plaintiff to recover in any form of action." We are not sure that we quite appreciate the meaning of the word "privity" in this passage: but the truth seems to have been, that the merits as disclosed at the trial were against the plaintiff, and that the court was not disposed to be astute and to give him judgment after his failure at the trial.

Another exception to the general rule has been held to exist, where the owner of the goods has left them for his own convenience where they could

¹ 1 Smith's L. C. 151.

² 1 W. & T. (L. C.) 106.

³ 8 T. R. 308.

⁴ L. R. 3 C. P. 38.

⁵ 5 El. & Bl. 746.

be lawfully seized for the debt of the person from whom he seeks indemnity. *England v. Marsden*.¹ The plaintiff in that case seized the defendant's goods under a bill of sale, but did not remove them from the defendant's house. The plaintiff left them there for his own convenience, and they were afterwards distrained by the defendant's landlord. The plaintiff paid the rent distrained for, and brought an action to recover the money from the defendant. The court, however, held that the action would not lie, as the plaintiff might have removed his goods before, and could not under the circumstances be considered as having been compelled to pay the rent. This appears to us a very questionable decision. The evidence did not show that the plaintiff's goods were left in the defendant's house against his consent; and although it is true that the plaintiff only had himself to blame for exposing his goods to seizure, we fail to see how he thereby prejudiced the defendant, or why, having paid the defendant's debt in order to redeem his own goods from lawful seizure, the plaintiff was not entitled to be reimbursed by the defendant. This decision has been questioned before by THIESIGER, L. J., in 15 Ch. D. 417, and by the late VAUGHAN WILLIAMS, J., in the notes to the last edition of Wms. Saunders, vol. 1, p. 361, and we think the decision ought not to be followed. Be the case of *England v. Marsden*¹ however, right or wrong, it is distinguishable in its facts from the case now before us.

In order to bring the present case within the general principle alluded to above, it is necessary that the goods seized shall have been lawfully seized; and it was contended before us that the sons' goods were in this case wrongfully seized, and that the defendant, therefore, was not bound to indemnify them. But when it is said that the goods must be lawfully seized, all that is meant is that as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them. It is plain that the principle has no application, except where the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place; it is because as between them the wrong goods have been seized that any question arises. Now, in this case it has been decided between the owners of the goods seized (i.e., the sons), and the sheriff seizing them, that the goods were rightfully seized; and although the defendant is not estopped by this decision, and is at liberty, if he can, to show that the seizure was one which the sheriff was not justified in making, he has not done so. Indeed, the defendant's connection with his sons' business was such as to justify the inference that the sheriff had a right to seize the goods for the defendant's debt, and if, in truth, any mistake was made by the sheriff, the defendant had only himself to thank for it. His own conduct led to the seizure, and although he did not in fact request it to be made, he brought the seizure about, and has wholly failed to show that the seizure was wrongful on the part of the sheriff.

¹ L. R. 1 C. P. 529.

The case, therefore, stands thus : goods which the defendant has admitted in writing to be his sons' have, owing to his conduct, been legally taken in execution for his debt, and the proceeds of sale have been impounded as a security for what is due from him to the execution creditors. The defendant, therefore, was liable to repay to his sons the amount realized by the sale of the goods. This liability the plaintiff, as the sons' trustee in bankruptcy, was in a position to enforce, and he has never released it or agreed so to do except upon payment of 1200*l.* The plaintiff is in a position now to enforce that liability, if the defendant succeeds in showing that his express promise to pay 1200*l.* is not legally binding upon him. The plaintiff is content to take the 1200*l.* expressly promised to be paid instead of insisting on his right to the 1300*l.* ; and HUDDLESTON, B., has properly given the plaintiff judgment accordingly. This appeal must be dismissed with costs.

Judgment for the plaintiff.

SNOWDON *v.* DAVIS.

IN THE COMMON PLEAS, JULY 6, 1808.

[*Reported in 1 Taunton, 359.*]

THIS was an action for money had and received, etc. Upon the trial at the last Reading spring assizes, before CHAMBRE, J., it appeared, that on the 12th of February, 1806, a writ of *distringas* had issued out of the Court of Exchequer, directed to the sheriff of Berks, requiring him to distrain the inhabitants of the Borough of New Windsor by their lands and chattels, and to answer the issues of such lands, so that they should appear to render an account as in the annexed schedule mentioned. The schedule referred to was in substance, "Upon the inhabitants of the borough of New Windsor, for the deficiency of George Dixon and John Snow, collectors in the said borough, the several sums of 7*l.* 8*s.* 2*d.* and 74*l.* 2*s.*" By virtue of this writ, the sheriff issued a warrant to the defendant, commanding him to distrain the inhabitants of New Windsor for the insufficiency of Dixon and Snow the sums of 7*l.* 8*s.* 2*d.* and 74*l.* 2*s.* The defendant, under color of the warrant, demanded of the plaintiff, who was an inhabitant of the borough of New Windsor, the two several sums of 7*l.* 8*s.* 2*d.* and 74*l.* 2*s.* : the plaintiff at first refused to pay the money, but upon a subsequent demand made, he paid it; upon which the defendant gave him a receipt for so much money by him distrained under His Majesty's writ for that purpose issued against the inhabitants of New Windsor. On the 12th of February, 1806, another writ of *distringas* issued to the sheriff of Berks, commanding him to distrain the several persons, collectors, in the schedule thereto annexed named, by all their lands and chattels, and to

answer the issues of such lands, so that they should appear to render an account as in the said schedule mentioned. The schedule was, "Upon the borough of New Windsor, G. Dixon and J. Snow, collectors, the sum of 132*l.* 14*s.* 7*d.*" Upon this writ the sheriff issued his warrant to the defendant, to distrain upon Snow and Dixon, the collectors there, the sum of 132*l.* 14*s.* 7*d.*; upon which warrant the defendant demanded of the plaintiff that sum, and also the sum of 6*l.* 12*s.* 5*d.* for issues. The plaintiff at first refused to pay him, but the defendant took possession of his goods; upon which the plaintiff paid him both sums, and the defendant gave him a receipt for the money, as received under His Majesty's writ of *distringas* for arrears of taxes, and one shilling in the pound issues, viz., *distringas* 132*l.* 14*s.* 7*d.*, issues 6*l.* 12*s.* 5*d.* The defendant proved, that before the time of bringing this action, the sums levied by color of the first writ had been paid over by himself to the sheriff, and by the sheriff into the Exchequer, and that the sheriff had received his *quietus*. He also proved that the sums levied under color of the last writ had been paid over by himself to the under-sheriff before the action brought. CHAMBERE, J., directed the jury, that the plaintiff was entitled to recover the sums he had so paid, deducting the issues upon the sums mentioned in the first writ, which issues the defendant was, by the practice of the Court of Exchequer, authorized to levy. The jury found a verdict for the plaintiff for 216*l.* 13*s.* 10*d.*, being the amount of the several sums of money so paid by the plaintiff, deducting thereout 4*l.* 1*s.* 6*d.* for the issues of 1*s.* in the pound on the amount received under first writ.

Williams, Serjt., had in the last term obtained a rule *nisi* that the verdict might be set aside, and a nonsuit entered, upon the ground that as the money had been paid over by the bailiff to his principal, the action for money had and received could not be supported against the bailiff.

Shepherd, Serjt., on a former day in this term, showed cause against this rule.

Williams, in support of his rule.

Cur. adv. vult.

MANSFIELD, C. J., on this day delivered the judgment of the court.

The facts of the case are short and few. A writ of *distringas* issued out of the Exchequer to the sheriff of Berks, to levy issues on the inhabitants of New Windsor. The sheriff made his warrant, following the words of the *distringas*, and authorizing the defendant, his bailiff, to levy these issues. The *distringas* did not order the sheriff, nor did the sheriff order his bailiff, to levy the greater sums of 7*l.* 8*s.* 2*d.* and 74*l.* 2*s.* The bailiff threatens Snowdon to distrain his goods for these two sums. For a part of them, namely, for the issues he had, for the residue he had not a right to distrain. The plaintiff, under the terror of a distress, pays both these sums. The bailiff pays the money over to the sheriff, and the sheriff to the Exchequer; and it is objected, that as it has been paid over, the action for money had and received does not lie against the bailiff; and this is compared to the

action to lay upon the goods of tax collector. But as bailiff
upon inhabitants of the town instead of tax collector
of distress. Said action in money had and received
lie

case of an agent ; and the authorities are cited, of *Sadler v. Evans*, *Campbell v. Hall*,¹ *Buller v. Harrison*,² and several others. In the case of *Sadler v. Evans*, the money was paid to the agent of Lady Windsor for Lady Windsor's use ; in that of *Buller v. Harrison*, the money was paid to the broker, expressly for the benefit of the assured. In *Pond v. Underwood*, the money was paid for the use of the administrator. Can it in this case be said with any propriety, that the money was paid to the bailiff for the purpose of paying it to the sheriff, or to the intent that the sheriff might pay it into the Exchequer ? The plaintiff pays it under the terror of process, to redeem his goods, not with an intent that it should be delivered over to any one in particular. To make the argument the more curious, if it had happened that the plaintiff had looked at the warrant, he could not have paid the money with a view that it should be paid over to the sheriff ; for he would there have seen an authority to levy 4*l.* 1*s.* 6*d.* only. He clearly then paid the money under the terror of a distress. With respect to the other writ, the circumstances are the same. Under the like terrors of a distress, he pays the second sum. The warrant was, to levy upon the goods of the collectors, not upon those of the inhabitants of New Windsor. The plaintiff pays that sum also to the bailiff, the bailiff having no authority whatsoever to receive it. The action for money had and received very well lies under the circumstances of this case, which in no respect resembles the cases cited, and the rule for a nonsuit must therefore be discharged.

JOHNSON AND ANOTHER v. ROYAL MAIL STEAM PACKET COMPANY.

IN THE COURT OF COMMON PLEAS, NOVEMBER 25, 1867.

[*Reported in Law Reports, 3 Common Pleas, 38.*]

DECLARATION in trover for two ships and for money paid. Pleas : Not guilty, and never indebted. There were other pleadings, which gave rise only to questions of fact.

The action was tried before ERLE, C. J., at the sittings in London after Michaelmas term, 1864, and was then turned into a special case, and the facts therein stated, as far as related to the present questions, were as follows : The European and Australian Royal Mail Company, Limited, were the owners of two steam-vessels, which they mortgaged in November, 1857, to the plaintiffs. In the month of April, 1858, the European and Australian Royal Mail Company, under circumstances held to show acquiescence by the mortgagees, entered into an agreement with the defendants, under the terms of which the defendants were to work the steamers, with a view to

¹ 1 Cowp. 204.

² 2 Cowp. 565.

amalgamation, until further notice, paying all expenses, and receiving all the profits, the European and Australian Royal Mail Company indemnifying them for the loss they might sustain thereby, if any, upon a periodical statement of accounts. The defendants at that time had no notice of the mortgage. In the beginning of July, 1858, the plaintiffs gave the defendants notice of their mortgage, and required them to deliver up the vessels to their agent at Sydney. The vessels were then running between Suez and Sydney, and were at that time at Suez preparing to start for Sydney, and the defendants had at that time entered into engagements with third parties for the coming voyages, so that they had an interest in using them, which would have entitled them to do so, in spite of any notice which they might have received from the European and Australian Royal Mail Company, terminating the agreement. In accordance with the notice from the plaintiffs, the defendants delivered up the vessels to their agent at Sydney on their arrival there; but at the time of such delivery a sum of more than 5000*l.* was due from the defendants to the officers and crews of the vessels for their wages, for which the latter were entitled to a maritime lien upon the vessel.

The officers and crews took proceedings in the Vice Admiralty Court at Sydney, and shortly after the vessels had been delivered up to the plaintiffs they were seized by the officers of that court, and a difficulty arising with respect to the payment of the money, partly owing to the want of a properly authorized agent of the plaintiffs there, they were detained some months. Ultimately the plaintiffs paid the sum claimed and obtained possession of the ships, which were then sold, but realized less than the amount for which they were mortgaged.

The plaintiffs claimed a sum for the use and occupation of the ships from the time of notice till the delivery up of the ships at Sydney; the repayment of the wages which had been paid by the plaintiffs; and damages for the detention of the ship, on the ground that the delivery of the ship, subject to the lien for wages, was not a sufficient delivery of it in law.

Horace Lloyd, Maude with him, for the plaintiffs.

Mellish, Q. C., Bushby with him, for the defendants.

The judgment of the court (WILLES, BYLES, and KEATING, JJ.) was delivered by

WILLES, J. I will proceed to consider the claims in respect of the subsequent payments made by the plaintiffs, and the expenses incurred by reason of their having had to make those payments.¹

The Royal Mail Company, we must take it, received, as they had a right to receive under the agreement, the earnings of the voyage, or perhaps to speak more accurately, they received what was paid in respect of freight upon the voyage from government, from passengers, and in respect of cargo; whether the voyage was favorable or not, in a pecuniary point of view, is

¹ Only so much of the opinion is given as relates to this question. — ED.

immaterial, and although freight cannot be said now, in so strict a sense as formerly, to be the mother of wages, yet it would follow as a matter of business, according to ordinary practice, that they ought thereout to have discharged the wages of the crew of the vessel. Those wages were incurred during the period of their possession and control, and the crew were employed by them. Theirs were the hands which received what was paid for freight, and theirs were the hands which ought to have paid the men by whose labor that freight was earned. Moreover, it was expressly provided by the agreement between the European and Australian Mail Company and the defendants that the latter should pay the working expenses in the first instance. Wages, of course, ought to be paid speedily, and in respect of that obvious piece of justice a remedy is given, whereby the seamen are authorized to have the vessel detained by the process of the Admiralty in order to satisfy their claims. Now, these wages were left unpaid; the vessel was seized in the Admiralty Court; the money was not ready on the spot; various causes, partly resting with the plaintiffs, led to very great delay; but in the result the mortgagees did pay the wages, and the vessel was released, — and this gives rise to the second claim.

Now the mortgagees having had to pay sums of money for which the Royal Mail Company were liable in the first instance, which they ought, according to maritime usage, and by their contract with the European and Australian Company, to have forthwith paid; what answer is set up by the Royal Mail Company against reimbursing the mortgagees who have paid their debt? Of course there is, upon the surface, that by the law of this country, differing, it is said, in that respect from the civil law, nobody can make himself the creditor of another by paying that other's debt against his will or without his consent; that is expressed by the common formula of the count for money paid for the defendant's use, at his request. That is the general rule, undoubtedly; but it is subject to this modification, that money paid to discharge the debt of another cannot be recovered unless it was paid at his request, or under compulsion, or in respect of a liability imposed upon that other. This is the modification of the rule relied upon by the plaintiff, and the question is, within which branch of the rule the present case falls?

It was argued on the part of the defendants that the non-payment of the wages was a breach of contract only; and it was said the European and Australian Company may recover, because they have an agreement with the Royal Mail Company by which they have stipulated that the latter should pay those wages; so let them sue. They have, moreover, sued, and this court has held that the action was maintainable; and it was held, if one may use such an expression *in terrorem* over the court, that if we decided that the mortgagees should recover in this action for the wages that they paid, the European and Australian Company may also recover in their action, and so that the same sum of money would be recovered by two

different persons against the same defendants in respect of the same matter, which would be absurd. That difficulty, however, is not a practical one, because if the defendants pay the plaintiffs, the European and Australian Company could only recover nominal damages in respect of the breach of that contract; they did not pay the wages in question; those were paid by the mortgagees, paid out of their moneys, and not out of the moneys of the European and Australian Company. It would be, therefore, a matter of nominal damages, simply founded upon the breach of contract, and by reason of the technical rule that any breach of contract, although not the cause of any damage, gives rise to a claim for nominal damages. But then it is said if you get rid of that, how do you dispose of the objection that there is no contract between the mortgagees and the Royal Mail Company? The answer was this, on the part of the plaintiffs, that the contract is not set up by them as mortgagees to enforce any claim thereupon, the contract is set up by the defendants, the Royal Mail Company, for the purpose of justifying their detention of the vessel as against the mortgagees; and if they can justify the sailing of the vessel from Suez to Sydney, as against the mortgagees, by reason of their having a bailment which gave them an interest, and in respect of that interest and their being entitled to sail her upon that voyage, it seems that it would be blowing hot and cold that they should be allowed to give up the vessel upon other terms than those of the contract which has justified the course which they have taken. Moreover, the compulsion of law which entitles a person, paying the debt of another, to recover against that other as for money paid, is not such a compulsion of law as would avoid a contract, like imprisonment. It has been decided in numerous cases that restraint of goods by reason of the non-payment of the debt due by one to another is sufficient compulsion of the law to entitle a person who has paid the debt in order to relieve his goods from such restraint, to sustain a claim for money paid. This is a case which we have been compelled to consider very much upon its own circumstances, which are very peculiar, and may be difficult to be made a precedent, perhaps, in any future case. Perhaps the nearest case that could be put by way of illustration would be this. A. lends B. his horse for a limited period, which would imply that he must pay the expense of the horse's keep during the time he retains it. B. goes to an inn and runs up a bill, which he does not pay, and the innkeeper detains the horse. In the mean time A. has sold the horse out-and-out for its full price to C., and C. is informed that the horse is at the inn; he proceeds there, to take him away, but is told he cannot take him until he pays the bill, and he pays the bill accordingly and gets his horse; can C., who in order to get his horse is obliged to pay the debt of another, sue that other in an action for money paid? We are clearly of opinion that he could; and without heaping up authorities where it has been held, independent of contract, that a person occupying a property in respect of which there is a claim that ought to

have been discharged by another, being compelled to pay, is entitled to reimbursement, we think that this is a case in which the mortgagees, by compulsion of law, have paid a debt for which the Royal Mail Company were liable, — a ready money debt which they ought to have provided for on the arrival of the vessel at Sydney, — and that, therefore, in respect to the claim for wages the plaintiffs are entitled to recover as on the count for money paid.

Judgment for the defendants as to the first and third claims, and for the plaintiffs as to the second claim.

REMEMBER PRESTON v. THE CITY OF BOSTON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1831.

[Reported in 12 Pickering, 7.]

ASSUMPSIT to recover \$711.50, money had and received to the use of the plaintiff, being the amount of a tax assessed upon him for the year 1828, for his poll and personal estate, and by him paid to the treasurer and collector of the city of Boston.

At the trial, before WILDE, J., it was proved that the plaintiff, with his wife, had lived at board in Medford several years, and had been taxed there four years preceding 1828, and also that year, and that on the 1st of May, 1828, one of the assessors of Medford saw him there, at the house of his son-in-law, with whom he and his wife were then boarders. The plaintiff was usually in Boston some days every three or four weeks, where his principal business was the taking care of his property, consisting chiefly of public stocks and money, and on those occasions he boarded with a son-in-law who resided there; and the early part of the month of May, 1828, the plaintiff passed in Boston.

It was not questioned on the part of the defendants that the plaintiff had his residence in Medford and was liable to be taxed there in the year 1828. The defence set up was, that he had requested the assessors of Boston to tax him there by the following note addressed to them. "Boston, Gough Street, May, 1828. You will please to be informed that I am a boarder at my son's, E. D. Clarke, and you are requested to assess me this year a light tax for personal estate; trusting in your prudence and moderation, it is my wish in future to pay a light tax to this city."

The plaintiff was the owner of real estate in Boston, for which he admitted that he was regularly taxed in 1828. The taxes of that year were committed to Mackay, the treasurer and collector, on the 1st of November, and he soon gave notice to the plaintiff of his being taxed in Boston, and of the amount of his tax, with the time when payment would be required. On

the 20th of December, 1828, the plaintiff called upon Mackay, paid the tax on his real estate, and then objected to the tax on his poll and personal estate as being an illegal assessment, saying that he was taxed wrongfully, that he had been taxed in Medford for his poll and personal estate for 1828, and had already paid his taxes there. Mackay replied that if he did not pay at the time limited, a warrant of distress must be issued against him, unless he obtained an abatement. The plaintiff thereupon petitioned the mayor and aldermen of the city for an abatement of his tax, which being refused, he paid the amount to Mackay on the 17th of January, 1829.

Upon these facts such judgment was to be rendered, upon nonsuit or default, as the whole court should direct.

Stearns and *A. Bartlett* for the plaintiff.

J. Pickering (City Solicitor) for the defendants.

SHAW, C. J., delivered the opinion of the court.

The only remaining question is, whether this money was paid voluntarily or under duress.¹ A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he protested at the time against his liability. The reason of this is obvious. The party making the demand may know the means of proving it, which he may afterwards lose; and because another course would put it in the power of the other party to choose his own time and opportunity for commencing a suit. *Brisbane v. Dacres*.² But it is otherwise when a party is compelled by duress of his person or goods to pay money for which he is not liable; it is not voluntary but compulsory, and he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back. *Astley v. Reynolds*.³

What shall constitute such duress, is often made a question. Threat of a distress for rent is not such duress, because the party may replevy the goods distrained and try the question of liability at law. *Knibbs v. Hall*.⁴ Threat of legal process is not such duress, for the party may plead, and make proof, and show that he is not liable. *Brown v. M'Kinnally*.⁵ But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable recover it back as money had and received. *Amesbury W. & C. Manuf. Co. v. Amesbury*.⁶

¹ Only so much of the opinion is given as relates to this question. — ED.

² 5 Taunt. 143.

³ 2 Str. 916.

⁴ 1 Esp. 84.

⁵ 1 Esp. 279.

⁶ 17 Mass. 461.

It appears by the facts agreed that upon the first notice of the tax, the plaintiff applied to the treasurer and collector, setting forth his specific ground of objection, namely, that he was not an inhabitant and not liable to the tax on personal property. The plaintiff was informed by the collector that he had no discretion on the subject, and unless he obtained an abatement a warrant of distress would issue against him. He then applied to the city government, stated the grounds of his objection, and remonstrated against the tax; but they decided that the tax must be paid, of which the collector was duly informed. The law under which the treasurer and collector acted obliged him to issue a warrant, under which the person and property of the plaintiff would have been liable to be taken, and that officer had notified him that such warrant would be issued. Under these circumstances the money was paid, and we think it cannot be considered as a voluntary payment, but a payment made under such circumstances of constraint and compulsion, and with such notice on his part that it was so paid, that on showing that he was not liable he may recover it back in this action from the defendants, into whose treasury it has gone.

Defendants defaulted.

NELSON J. ELLIOTT v. SAMUEL SWARTWOUT.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY TERM, 1836.

[*Reported in 10 Peters, 137.*]

ON a certificate of division from the Circuit Court of the United States for the southern district of New York.

The suit was originally instituted in the Superior Court of the city of New York, by the plaintiff against the defendant, the collector of the port of New York; and was removed by *certiorari* into the Circuit Court of the United States.

The action was *assumpsit*, to recover from the defendant the sum of thirty-one hundred dollars and seventy-eight cents, received by him for duties, as collector of the port of New York, on an importation of worsted shawls with cotton borders, and worsted suspenders with cotton straps or ends. The duty was levied at the rate of fifty per centum *ad valorem*, under the second clause of the second section of the act of the 14th of July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports," as manufactures of wool, or of which wool is a component part. The plea of *non-assumpsit* was pleaded by the defendant in bar of the action.

The following points were presented during the progress of the trial for the opinion of the judges; and on which the judges were opposed in opinion: —

First. Upon the trial of the cause, it having been proved that the shawls imported, and upon which the duty of fifty per centum *ad valorem* had been received, were worsted shawls with cotton borders sewed on; and that the suspenders were worsted with cotton ends or straps; and that worsted was made out of wool by combing, and thereby became a distinct article, well known in commerce under the denomination of worsted.

The judges were divided in opinion whether the said shawls and suspenders were or were not a manufacture of wool, or of which wool is a component part, within the meaning of the words "all other manufactures of wool, or of which wool is a component part," in the second article of the second section of the act of Congress of the 14th of July, 1832.¹

Second. Whether the collector is personally liable in an action to recover back an excess of duties, paid to him as collector; and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States; he, the collector, acting in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him.

Third. Whether the collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid, in the regular and ordinary course of his duty, into the treasury of the United States, he, the collector, acting in good faith, and under instructions from the treasury department; a notice having been given, at the time of payment, that the duties were charged too high, and that the party paying so paid to get possession of his goods, and intended to sue to recover back the amount erroneously paid; and a notice not to pay over the amount into the treasury.

These several points of disagreement were certified to this court by the direction of the judges of the Circuit Court.

Mr. *Ogden* for the plaintiff.

Mr. *Butler*, Attorney-General, for the defendant.

Mr. Justice THOMPSON delivered the opinion of the court.

2. The case put in the second point is where the collector has received the money in the ordinary and regular course of his duty, and has paid it over into the treasury, and no objection made at the time of payment, or at any time before the money was paid over to the United States. The manner in which the question is here put presents the case of a purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money. It is therefore to be considered as a voluntary payment, by mutual mistake of law; and, in such case, no action will lie to recover back the money. The construction of the law is open to both parties, and each presumed to know it. Any instructions from the treasury

¹ So much of the case as relates to this point has been omitted. — Ed.

department could not change the law, or affect the rights of the plaintiff. He was not bound to take and adopt that construction. He was at liberty to judge for himself, and act accordingly. These instructions from the treasury seem to be thrown into the question for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he had paid over the money, without any intimation having been given that the duty was not legally charged, cannot be sustained upon any sound principles of policy or of law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard, by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit. It is no sufficient answer to this that the party cannot sue the United States. The case put in the question is one where no suit would lie at all. It is the case of a voluntary payment under a mistake of law, and the money paid over into the treasury ; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right.

The case of *Morgan v. Palmer*¹ was an action for money had and received, to recover back money paid for a certain license ; and one objection to sustaining the action was that it was a voluntary payment. The court did not consider it a voluntary payment, and sustained the action : but Chief Justice ABBOT, and the whole court, admitted that the objection would have been fatal, if well-founded in point of fact. The court said it had been well argued, that the payment having been voluntary it could not be recovered back in an action for money had and received. And in *Brisbain v. Daeres*,² the question is very fully examined by GIBBS, J., and most of the cases noticed and commented upon, and with the concurrence of the whole court, except CHAMBRE, J., he lays down the doctrine broadly, that where a man demands money of another, as matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum of money voluntarily, he cannot recover it back. It may be, says the judge, that, upon a further view, he may form a different opinion of the law ; and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise. There are many doubtful questions of law. When they arise, the defendant has an option either to litigate the question, or submit to the demand and pay the money. But it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the

¹ 2 B. & C. 729.² 5 Taunt. 154.

money. This doctrine is peculiarly applicable to a case where the money has been paid over to the public treasury, as in the question now under consideration. Lord ELDON in the case of *Bromley v. Holland*¹ approves the doctrine, and says it is a sound principle that a voluntary payment is not recoverable back. In *Cox v. Prentice*,² Lord ELLENBOROUGH says; "I take it to be clear, that an agent who receives money for his principal is liable, as a principal, so long as he stands in his original situation, and until there has been a change of circumstances, by his having paid over the money to his principal, or done something equivalent to it." And in *Buller v. Harrison*,³ Lord MANSFIELD says the law is clear, that if an agent pay over money which has been paid to him by mistake, he does no wrong, and the plaintiff must call on the principal; that if, after the payment has been made and before the money has been paid over, the mistake is corrected, the agent cannot afterwards pay it over without making himself personally liable. Here, then, is the true distinction: When the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot be made personally responsible; but if, before paying it over, he is apprised of the mistake and required not to pay it over, he is personally liable. The principle laid down by Lord ELLENBOROUGH, in *Townsend v. Wilson*,⁴ cited and relied upon on the part of the plaintiff, does not apply to this case. He says, if a person gets money into his hands illegally, he cannot discharge himself by paying it over to another; but the payment, in that case, was not voluntary; for, says Lord ELLENBOROUGH, the plaintiff had been arrested and was under duress when he paid the money. In *Stevenson v. Mortimer*,⁵ Lord MANSFIELD lays down the general principle, that if money is paid to a known agent, and an action is brought against the agent for the money, it is an answer to such action that he has paid it over to his principal. That he intended, however, to apply this rule to cases of voluntary payments made by mistake, is evident from what fell from him in *Sadler v. Evans*.⁶ He there said, he kept clear of all payments to third persons but where it is to a known agent; in which case the action ought to be brought against the principal, unless in special cases, as under notice, or *mala fides*; which seems to be an admission that if notice is given to the agent before the money is paid over, such payment will not exonerate the agent. And this is a sound distinction, and applies to the two questions put in the second and third points in the case now before the court. In the former, the payment over is supposed to be without notice; and in the latter after notice and a request not to pay over the money. The answer, then, to the second question is, that under the facts there stated the collector is not personally liable.

3. The case put by the third point is where, at the time of payment, notice is given to the collector that the duties are charged too high, and

¹ 7 Vesey, 23.² 3 M. & S. 348.³ 2 Cowp. 563.⁴ 1 Campb. 396.⁵ 2 Cowp. 816.⁶ 4 Bur. 1987.

that the party paying so paid to get possession of his goods ; and accompanied by a declaration to the collector, that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasury.

This question must be answered in the affirmative ; unless the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him ; but that recourse must be had to the government for redress. Such a principle would be carrying an exemption to a public officer beyond any protection sanctioned by any principles of law or sound public policy. The case of *Irving v. Wilson and Another*,¹ was an action for money had and received, against custom-house officers, to recover back money paid to obtain the release and discharge of goods seized that were not liable to seizure ; and the action was sustained. Lord KENYON observed, that the revenue laws ought not to be made the means of oppressing the subject ; that the seizure was illegal ; that the defendants took the money under circumstances which could by no possibility justify them ; and, therefore, this could not be called a voluntary payment.

The case of *Greenway v. Hurd* ² was an action against an excise officer, to recover back duties illegally received ; and Lord KENYON does say, that an action for money had and received will not lie against a known agent, but the party must resort to the superior. But this was evidently considered a case of voluntary payment. The plaintiff had once refused to pay, but afterwards paid the money ; and this circumstance is expressly referred to by BULLER, J., as fixing the character of the payment. He says, though the plaintiff had once objected to pay the money, he seemed afterwards to waive the objection by paying it. And Lord KENYON considered the case as falling within the principle of *Sadler v. Evans*,³ which has already been noticed. In the case of *Snowdon v. Davis*,⁴ it was decided that an action for money had and received would lie against a bailiff, to recover back money paid through compulsion, under color of process, by an excess of authority, although the money had been paid over. The court say, the money was paid by the plaintiff under the threat of a distress ; and although paid over to the sheriff and by him into the Exchequer, the action well lies ; the plaintiff paid it under terror of process to redeem his goods, and not with intent that it should be paid over to any one. The case of *Ripley v. Gelston* ⁵ was a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. The plaintiff objected to the payment, as being illegal, but paid it for the purpose of obtaining the clearance, and the money had been paid by the collector into the branch bank to the credit of the treasurer. The defence was put on the ground that the money had been paid over ; but this was held insufficient. The money, say the court, was demanded as a condition of the clearance ;

¹ 4 T. R. 485.

² 4 T. R. 554.

³ 4 Bur. 1984.

⁴ 1 Taunt. 358.

⁵ 9 Johns. 201.

and that being established, the plaintiff is entitled to recover it back, without showing any notice not to pay it over. The cases which exempt an agent do not apply. The money was paid by compulsion. It was extorted as a condition of giving a clearance, and not with intent or purpose to be paid over. In the case of *Clinton v. Strong*,¹ the action was to recover back certain costs which the marshal had demanded on delivering up a vessel which had been seized, which costs the court considered illegal; and one of the questions was whether the payment was voluntary. The court said the payment could not be voluntary. The costs were exacted by the officer, *colore officii*, as a condition of the redelivery of the property; and that it would lead to the greatest abuse to hold that a payment under such circumstances was a voluntary payment precluding the party from contesting it afterwards. The case of *Hearsey v. Pryn*² was an action to recover back toll which had been illegally demanded; and SPENCER, J., in delivering the opinion of the court, says the law is well settled, that an action may be sustained against an agent who has received money to which the principal had no right, if the agent has had notice not to pay it over. And in the case of *Fry v. Lockwood*,³ the court adopts the principle, that when money is paid to an agent for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back. But the distinction taken in the case of *Ripley v. Gelston* is recognized and adopted; that the cases which exempt an agent when the money is paid over to his principal without notice, do not apply to cases where the money is paid by compulsion, or extorted as a condition, etc. From this view of the cases, it may be assumed as the settled doctrine of the law, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal; if he has had notice not to pay it over. The answer, therefore, to the third point must be, that the collector is personally liable to an action to recover back an excess of duties paid to him as collector, under the circumstances stated in the point; although he may have paid over the money into the treasury.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the southern district of New York, and on the questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, on the first question, that the said shawls and suspenders were not a manufacture of wool, or of which wool was a component part, within the meaning of the words "all other manufactures of wool, or of which wool is a component part," in the second article of the second section of the act of Congress of July 14, 1832.

¹ 9 Johns. 369.² 7 Johns. 179.³ 4 Cow. 456.

On the second question, it is the opinion of this court, that, under the facts as stated in the said second question, the collector is not personally liable.

On the third question, it is the opinion of this court that the collector, under the circumstances as stated in the said question, is liable to an action to recover back an excess of duties paid to him as collector, although he may have paid over the money into the treasury. Whereupon it is ordered and adjudged by this court, to be so certified to the said Circuit Court of the United States for the southern district of New York.

THE BOSTON & SANDWICH GLASS COMPANY v. CITY OF BOSTON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1842.

[*Reported in 4 Metcalf, 181.*]

INDEBITATUS ASSUMPSIT for money had and received. The case was submitted to the court on the following statement of facts: "The plaintiffs are a body corporate in this Commonwealth, chartered by St. 1825, c. 99, for the purpose of manufacturing glass in the city of Boston and the town of Sandwich. But they have, and always have had their manufactory, and all their machinery, in Sandwich, and a warehouse, for the general transaction of their business, in Boston.

"In the present action (commenced on the 7th day of March, 1840), the plaintiffs seek to recover of the defendants \$1075, under the following circumstances: Taxes have been annually levied by the defendants upon the personal property of the plaintiffs, from the year 1826 to the year 1839, inclusive, — with the exception of the year 1831, — and have been paid into the treasury of the defendants. The sums so levied and paid amounted to \$1066. The plaintiffs were also taxed for polls, in 1839 and the two preceding years, to the amount of \$9, which was also paid, as aforesaid, by them. These several poll taxes were assessed for the polls of minors then in the service of the plaintiffs, at their warehouse in Boston, and receiving salaries. The plaintiffs were also taxed by the defendants (in addition to said taxes on personal property and polls), for their real estate, in 1836 and the three following years. No State tax was levied on the plaintiffs between 1826 and 1839, except in 1829 and 1830. In 1839 the plaintiffs paid the taxes levied on their personal property as aforesaid, to the defendants' collector, without any verbal objection to paying the same; but they immediately presented to said collector the following written protest: 'Boston, November 2, 1839. To Richard D. Harris, Esq., treasurer and collector of the county of Suffolk and city of Boston.

Sir: The undersigned hereby give you notice that they protest against the payment of \$141.25, and assessed to them as a tax upon their personal estate, income, etc., for the year 1839, in said city and county, as an illegal tax; that they pay the same under duress and not voluntarily; and that they shall institute suit to recover back the same. Boston & Sandwich Glass Company, by

DEMING JARVES, Agent.

"This payment and protest were made on the day after said taxes became payable, but before the usual summons required by law in case of the non-payment of taxes, was issued or issuable.

"The taxes of the years preceeding 1839 were paid by the plaintiffs, without making any objection at the time, — the plaintiffs and defendants supposing them to be rightly assessed, — upon and after the delivery to the plaintiffs of the usual tax bills, so called, issued by the defendant's collector and treasurer, which tax bills stated the amount of the city and county tax on the plaintiffs, for polls, real estate, personal estate, and income, and to which was added a printed statement, which is copied in the margin.¹

"If, upon the foregoing facts, the plaintiffs are entitled to recover the whole or any part of the taxes so assessed, and are not barred by the statute of limitations, or otherwise, judgment is to be rendered for such sum as the court shall order. If the plaintiffs are not entitled to recover any part of said amount, judgment is to be rendered for the defendants for their costs."

Dexter and Barrett for the plaintiffs.

J. Pickering, City Solicitor, for the defendants.

The opinion of the court was given by

DEWEY, J. The next inquiry is, whether the payment of these taxes by the plaintiffs was not so far a voluntary act as to absolve the defendants from all legal liability to refund the amount thus paid.² The legal principle relied upon, on this point, is this: that if a party, with full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards allege such payment to have been made by compulsion, and recover back the money, even though he should protest, at the time of such payment, that he was not legally bound to pay the same. The reason of the rule, and its

¹ "By a vote of the town, passed 27th May, 1811, the taxes must be paid within sixty days from the time they are issued. At the expiration of the sixty days, the treasurer by law is directed to issue a summons to those who are then delinquent, and if the tax is not paid in ten days after such summons, with twenty cents for said summons, to issue his warrants to the special collectors, who will receive from delinquents, in addition to the tax, the fees allowed by law on serving executions, viz.: four per centum on the first one hundred dollars; two per centum on the second one hundred dollars; and one per centum on all over two hundred dollars. Interest will also be charged.

"RICHARD D. HARRIS, Treasurer and Collector.

"Boston, September 1."

² Only so much of the opinion is given as relates to this question. — ED.

propriety, are quite obvious, when applied to a case of payment upon a mere demand of money, unaccompanied with any power or authority to enforce such demand except by a suit at law. In such case, if the party would resist an unjust demand, he must do so at the threshold.¹ The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party who pays the money the privilege of selecting his own time and convenience for litigation; delaying it, as the case may be, until the evidence, which the other party would have relied upon to sustain his claim, may be lost by the lapse of time and the various casualties to which human affairs are exposed.

The rule alluded to, when properly applied, is doubtless a salutary one, and is not to be departed from, but in cases resting upon a plain and obvious distinction from such as are ordinarily and familiarly known as embraced within it. But the rule has its exceptions; and cases are not unfrequent, in which the party paying money upon an illegal demand, and knowing it to be such when making the payment, has been allowed to recover back the money. If there be a controlling necessity in the case, arising from the peculiar circumstances under which the money is demanded, the rule does not apply. Thus where money is extorted by duress of goods, assumpsit will lie for it, as was held in the early case of Astley v. Reynolds,² where the defendant had in pawn plate of the plaintiff, which he refused to deliver without the payment of the money illegally claimed; and it was held to be a payment by compulsion.

A payment of money illegally claimed by a collector, as tonnage duty or light money, and which the plaintiff paid to obtain a clearance of his vessel, was allowed to be recovered back. *Ripley v. Gelston.*³ So where money was paid to liberate a raft of lumber detained in order to exact an illegal toll, it was held to be a compulsory payment. *Chase v. Dwinal.*⁴ And generally, where money is paid to obtain the possession of property which the party making the illegal demand has under his control, such payment will be considered as compulsory. *Shaw v. Woodecock;*⁵ *Morgan v. Palmer.*⁶

Another class of cases, and one to which the present case more appropriately belongs, is where the payment of money is made upon an illegal demand by one who has authority to levy upon the property of the person upon whom such demand is made, and by a sale of such property to satisfy and discharge such claim; and where payment is made upon such a demand, and to prevent such seizure and sale of property, the payment is also compulsory. In most of the cases found in our own reports, where an action for money had and received has been instituted to recover back

¹ *Jones v. Houghton*, 61 N. H. 51, *accord.* — ED.

² 2 Stra. 916.

³ 9 Johns. 201.

⁴ 7 Greenl. 134.

⁵ 7 B. & C. 73.

⁶ 2 B. & C. 729.

money paid on an illegal assessment of taxes, either no question was raised, or the facts showed the payment to have been made under a protest. The question seems, however, to have been distinctly presented in the case of *Amesbury Woollen and Cotton Manuf. Co. v. Inhabitants of Amesbury*.¹ This was an action to recover the amount of taxes paid by the plaintiffs, from the year 1814 to 1818, inclusive. The payment for the year 1818 was upon a warrant of distress; but the payment for the previous years had been made without protest, or any denial of the defendants' right to demand the money; and it was insisted that the payments, for the years preceding 1818, were voluntary, and being such, the plaintiffs could not recover the money thus paid, although it was made to appear that such taxes were illegally demanded. But the court held that the voluntary payment of a part of the taxes thus assessed did not affect the right of the plaintiffs to recover the amount of money paid by them upon an illegal assessment. The obvious reason of the rule, though not prominently set forth in that case, is clearly stated in the opinion of the court, in the case of *Preston v. City of Boston*.² It arises from the power and authority placed in the hands of a collector of taxes, by virtue of his warrant, to levy directly upon the property or person of every individual whose name is borne on the tax list, in default of payment of the taxes. To use the language of the court in the case just referred to, "such warrant is in the nature of an execution running against the property and person of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability." Such being the state of the case, the payments made to a collector of taxes may be considered compulsory, and made under such circumstances as will authorize the party paying the money to recover back the same, if the tax was illegally assessed.

In addition to the sum thus paid, the party will be entitled to recover interest from the date of the writ, or time of demanding repayment, in cases where there was no protest or denial of right, at the time of paying such taxes; and when paid under such protest, or denial of liability to pay the same, the interest will be added from the time of paying the taxes.

The plaintiffs are to have judgment for the amount of taxes paid by them within six years next before action brought.

¹ 17 Mass. 461.² 12 Pick. 7.

THE CITY OF DETROIT v. JACOB MARTIN.

IN THE SUPREME COURT OF MICHIGAN, JUNE 6, 1876.

[Reported in 34 Michigan Reports, 170.]

ERROR to Superior Court of Detroit.

D. C. Holbrook for plaintiff in error.*Brennan & Donnelly* and *G. V. N. Lothrop*, for defendant in error.

MARSTON, J. Plaintiff below, defendant in error, was the owner of a certain lot in the city of Detroit upon which there was assessed ninety-six dollars and fifty-four cents on account of the opening of Labrosse street in said city. After the assessment was made he received a written notice signed by the city attorney notifying him of the fact, and requesting him to pay the amount thereof within sixty days from the date of service of the notice, and that in case of failure, at the expiration of that time the property so assessed would be advertised and sold by the receiver of taxes of said city to pay said assessment. After the expiration of the sixty days, and on the 3d of March, 1874, he paid said assessment, to prevent the threatened sale, under protest, and had the protest entered upon the books of the treasurer. Plaintiff remonstrated against the opening of said street, and prior to the commencement of suit in this case petitioned the common council of said city to repay him the amount with interest, which was refused. The provision of the city charter under which said assessment was levied and collected was by this court, at the June term thereof, 1875, declared unconstitutional, in the case of *Paul v. The City of Detroit*.¹

Plaintiff brought assumpsit to recover back the amount so paid, and the above facts were found by the jury in a special verdict, upon which judgment was rendered for the plaintiff. The city brought error, alleging that the payment was a voluntary one, that plaintiff was not entitled to recover, and that the facts found did not sustain the judgment.

As the case has been presented in this court upon the question whether the payment was voluntarily made or not, it would be well for us to understand clearly, not only the circumstances under which the money was paid, but the legal result or effect upon plaintiff's rights in case he had not paid this money, as by so doing we will be better enabled to determine the question submitted.

Plaintiff was the owner of the lot assessed. The amount assessed thereon was illegal and void, the statute under which such assessment was made having been unconstitutional. The city, through its proper officers, threatened to sell the lot if the assessment was not paid. To prevent this threatened sale the money was paid under protest. Such are the facts in brief.

¹ 32 Mich. 108.

If not paid and the property sold, what would have been the legal effect of such sale?

If plaintiff had not paid, we may assume the threat would have been carried out and the property sold. How would such sale have affected plaintiff's right or title thereto? Would such sale have constituted a cloud upon his title? Assuming that it would, in order to prevent this, he could have paid the amount under protest, and afterwards have maintained an action to recover it back. If a sale under the facts stated would not have constituted a cloud upon his title, then it may be at least doubtful whether the plaintiff has any remedy, as it is not pretended there was any fraud, duress, or seizure of his goods, either actual or threatened, or that the officers of the city had any authority to seize them. "A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality, if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance nor an apparent defect of title, and therefore in law could constitute no cloud."¹

Under the facts found in this case, and the law applicable thereto, the sale and conveyance thereunder would not have constituted a cloud upon plaintiff's title, even although by the charter assessments may be declared a lien upon the land, and the conveyance *prima facie* evidence of the regularity of the proceedings, because from an inspection of the conveyance, which would recite the proceedings, and of the record, it would at once appear that the assessment was wholly unwarranted by law and totally void.

The plaintiff at the time he paid this tax paid it with full knowledge of all the facts and circumstances. He is conclusively presumed to know the law applicable thereto. He is presumed to have known at the time he paid this tax that the statute under which the assessment was made was void, and that a sale of the premises therefor would constitute no cloud upon his title, and that he could not be injured by such sale.

Such being the legal conclusion from the facts found, was the payment voluntary or involuntary?

The plaintiff, however, does not bring himself within the principles of any of these cases.² He knew all the facts at the time he made the payment; none of his property was held by the party making the demand; no

¹ Cooley on Taxation, 542.

² A portion of the opinion containing a citation and discussion of cases has been omitted. — ED.

XX a sale of
land for the
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and not a
cloud upon title.
+ that a cloud
upon title.

seizure had been made or threatened, nor did it appear that the officer making the demand or that any officer had the power to compel in any way payment of the amount, except by a threatened sale of the property assessed, and which if carried out could injure no one, unless it might have been the purchaser. The threat therefore was a harmless one. It could not have alarmed the plaintiff, as it could not have affected his rights. If carried out, the sale would have had no force, and the conveyance thereunder no validity. The assessment was a mere nullity, and could not have been enforced in any way, there being no statute authorizing it. Yet the plaintiff, knowing all this, voluntarily went to the treasurer's office and paid the amount claimed. The case "stands on no higher ground than it would if the plaintiff, when the tax was demanded of him by the collector, had said to him: 'I know your tax is illegal and void; I am under no obligation to pay it, but I shall pay it under protest, and with an intention to sue for and recover it.' . . . All the authorities agree that money paid under such circumstances cannot be recovered." *Sheldon v. South School District*; ¹ *Buckley v. Stewart*.²

Where taxes had been levied under an unconstitutional statute, demanded and paid for a series of years, and the statute being then held void, suit was brought to recover the amount paid, *LOWRIE, J.*, said: "We state the case as one of a voluntary payment of taxes, because there is no pretence that the defendant's officers did any more than demand the tax under a supposed authority of the law; and there is no more a compulsion than where an individual demands a supposed right. The threat that is supposed to underlie such demands is a harmless one, — that, in case of refusal, the appropriate legal remedies will be resorted to. It is supposed that there was real compulsion, because no certificate would be granted by the health officer to the ships without the payment of the tax, and without the certificate no entry would be allowed by the custom-house officers. If this be the compulsion relied on, it is vain, for it proceeded from the federal officers, and not from the defendant, who could have nothing to do with it." *Taylor v. Board of Health*.³

If under the circumstances in this case the plaintiff could recover, I do not see what there would be to prevent parties from in all cases voluntarily paying their taxes under protest, and if at any time afterwards, within the statute of limitations, it was discovered, or decided by a court of competent jurisdiction, that the statute under which they were levied was illegal, then bringing an action and recovering them back again. The consequences of such a doctrine, to say the least, would be very serious.

What effect then does a protest made at the time have? Under the circumstances of this case it has none. It cannot make a payment otherwise voluntary involuntary. "A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he

¹ 24 Conn. 91.² 1 Day, 133.³ 31 Pa. St. 73.

protested at the time against his liability." SHAW, C. J., in *Preston v. Boston*; ¹ *Lee v. Inhabitants*, etc.²

Where money is illegally demanded, but under a claim of right, and the payment is an involuntary one, the protest is a notice to the person to whom the payment is made that the person paying does not acquiesce in the illegal demand, and thereby surrender up any right he may have to recover back the money. Besides, a payment without protest would prevent the party afterwards from recovering interest in an action brought to recover back the amount paid. *Atwell v. Zeluff*.³ The effect of a protest beyond this, if any, may not be very clear or well settled.

In this case the city claimed the money under color of right. The assessment was illegal, and the city had no means of enforcing payment, or of seizing the person or property of the plaintiff, or of selling his property and giving any one a colorable title thereto. Knowing all these facts, the plaintiff voluntarily paid the money, and cannot now recover it back.

The judgment must be reversed, and a judgment entered upon the special verdict in favor of the city, plaintiff in error to recover costs in both courts.

The other Justices concurred.

LAMBORN v. COUNTY COMMISSIONERS.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

[Reported in 97 United States Reports, 181.]

ERROR to the Circuit Court of the United States for the District of Kansas.

The facts are stated in the opinion of the court.

Mr. C. E. Bretherton for the plaintiff in error.

Mr. S. O. Thacher, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

Lamborn, the plaintiff in error in this case, is the trustee and representative of the National Land Company. This company had contracted with the Kansas Pacific Railway Company for the purchase of a large quantity of the lands in Kansas, to which the latter company was entitled under the congressional grant made to it, under the name of the Leavenworth, Pawnee, and Western Railroad Company, and the Union Pacific Railroad Company, Eastern Division, by the Acts of July 1, 1862, and July 2, 1864. The contract required the land company to pay all such taxes and assessments as might be lawfully imposed on the lands. And it provided that the railway company should, at the request of the land company, convey by deed of general warranty any of the lands purchased, whenever the purchase-

¹ 12 Pick. 13.

² 13 Gray, 479.

³ 26 Mich. 120.

money and interest and the necessary stamps should be furnished by the latter. The land company, after acquiring this contract, had contracted to sell large portions of the lands to third parties, taking from them agreements to pay all taxes and assessments that might be imposed upon the lands sold to them respectively. The lands in Dickinson County were assessed by the defendants for taxes for the years 1870, 1871, and 1872, successively, when, as yet, they were not taxable, no patent having been issued therefor, and the costs of surveying, selecting, and conveying the same not having been paid. These taxes, therefore, as decided by us in the case of *Railway Company v. Prescott*,¹ were not legal. Nevertheless, the Supreme Court of Kansas, in that case, had held such taxes legal; and the taxes for the year 1870, now in question, not having been paid, the treasurer of Dickinson County proceeded to advertise and sell the lands therefor in May, 1871, and, no person bidding the requisite amount, the lands were bid in for the county. The assessments for 1871 and 1872 were made against the lands whilst they were in this position.

By the laws of Kansas, if lands sold for taxes are bid in for the county, the county treasurer is authorized to issue a tax certificate to any person who shall pay into the county treasury an amount equal to the cost of redemption at the time of payment.² And if any lands sold for taxes are not redeemed within three years from the day of sale, the clerk of the county may execute a deed to the purchaser, his heirs or assigns, on the presentation to him of the certificate of sale.³ It is further provided, that if the county treasurer shall discover, before the sale of any lands for taxes, that on account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer such lands for sale; and if, after any certificate shall have been granted upon such sale, the county clerk shall discover that, for any error or irregularity, such land ought not to be conveyed, he shall not convey the same; and the county treasurer shall, on the return of the tax certificate, refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent per annum.⁴

In 1872, the plaintiff in error paid into the county treasury the sums due for taxes, interest, etc., on the said lands in Dickinson County, which had been sold for taxes as aforesaid, and received tax certificates therefor, without making any protest, not being aware at that time, as he alleges, that the lands were exempt from taxation, but supposing that the taxes were legal and valid. On the second day of January, 1874, after the decision of this court in *Railway Company v. Prescott*,⁵ he offered to return the tax certificates to the county treasurer, and demanded a return of the money paid by him into the county treasury, with interest, which was refused by the treasurer;

¹ 16 Wall. 603.

² Gen. Stats. of Kansas, c. 107, § 91.

³ Sect. 112.

⁴ Sect. 120.

⁵ 16 Wall. 603.

and thereupon this suit, against the board of county commissioners of that county, was brought to recover the same.

Under this state of facts the judges of the Circuit Court differed in opinion on the following points of law :—

1. Whether judgment should be rendered for the plaintiff or for the defendant.

2. Whether the acquisition of said tax certificates and the subsequent payment of taxes by the plaintiff was a voluntary payment of the money now sought to be recovered back, in such a sense as to defeat the right to such recovery.

3. Whether the statute of Kansas ¹ gives the right, upon the facts above found, to the plaintiff to recover in respect of the causes of action set out in the petition.

Judgment was given in favor of the defendant, in accordance with the opinion of the presiding judge, and Lamborn sued out this writ of error.

The plaintiff insists that he is to be regarded as a purchaser, and entitled under the statute referred to, ² or, if not under that statute, then on general principles of law, to a return of the money paid by him to the county treasurer.

The next question to consider, therefore, is whether money thus paid by way of redemption can be recovered back. There are only three grounds on which such a recovery can be maintained, — fraud, mistake, or duress.

No fraud is charged.

Mistake, in order to be a ground of recovery, must be a mistake of fact, and not of law. Such, at least, is the general rule. ³ *Hunt v. Rousmaniere*; ⁴ *Bilbie v. Lumley*; ⁵ 2 *Smith's Lead. Cas.* 398 (6th Ed. 458), notes to *Marriot v. Hampton*. A voluntary payment, made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back. *Clarke v. Dutcher*; ⁶ *Ege v. Koontz*; ⁷ *Boston & Sandwich Glass Co. v. City of Boston*; ⁸ *Benson & Another v. Monroe*; ⁹ *Milnes v. Duncan*; ¹⁰ *Stewart v. Stewart*; ¹¹ and see cases cited in note to 2 *Smith's Lead. Cas.* 403, 404 (6th Ed. 466). ¹²

In the present case, there is no dispute that all the facts and circumstances of the case bearing on the question of the legality of the tax, were fully known to the plaintiff. He professedly relied on the law, as declared by the Supreme Court of Kansas, and supposed that the tax was legal and valid.

The only other ground left, therefore, on which a right to recover back the money paid can be at all based, is, that the payment was not voluntary,

¹ Gen. Stats. p. 1058, §§ 120, 121.

² So much of the opinion as relates to this question has been omitted. — Ed.

³ 3 *Pars. Contr.* 398. ⁴ 1 *Pet.* 1. ⁵ 2 *East*, 183. ⁶ 9 *Cow. (N. Y.)* 674.

⁷ 8 *Pa. St.* 109. ⁸ 4 *Met. (Mass.)* 181. ⁹ 7 *Cush. (Mass.)* 125.

¹⁰ 6 *B. & C.* 671. ¹¹ 6 *Cl. & F.* 911. ¹² *Marriot v. Hampton*.

but by compulsion or duress. It is contended that the plaintiff was obliged to pay the taxes in order to remove the cloud from the title which had been raised by the tax sale, and to prevent a deed from being given to some third party after the expiration of the three years allowed for redemption.

It is settled by many authorities that money paid by a person to prevent an illegal seizure of his person or property by an officer claiming authority to seize the same, or to liberate his person or property from illegal detention by such officer, may be recovered back in an action for money had and received, on the ground that the payment was compulsory, or by duress or extortion. Under this rule, illegal taxes or other public exactions, paid to prevent such seizure or remove such detention, may be recovered back, unless prohibited by some statutory regulation to the contrary. *Elliott v. Swartwout*; ¹ *Ripley v. Gelston*; ² *Clinton v. Strong*; ³ and cases cited in 2 *Smith's Lead. Cas.* (6th Ed.) 468; *Cooley, Taxation*, 568.

But it has been questioned whether a sale or threatened sale of land for an illegal tax is within this rule, there being no seizure of the property, and nothing supervening upon the sale except a cloud on the title. This view has been adopted in Kansas. In *Phillips v. Jefferson County*,⁴ certain Indian lands, not legally taxable, were nevertheless assessed and sold for taxes, and a certificate issued to the purchaser. Phillips, having acquired title to the land, paid the amount of said taxes, at the same time denying their legality, and saying that he paid the money to prevent tax-deeds from issuing on the certificates. The court hold that the payment was purely voluntary, and add: "The money was not paid on compulsion or extorted as a condition. A tax-deed had been due for nearly two years. Had the plaintiff desired to litigate the question, he could have done so without paying the money; even had a deed been made out on the tax certificate, it would have been set aside by appropriate proceedings. There was no legal ground for apprehending any danger on the part of the plaintiff. He could have litigated the case as well before as after payment. Neither his person nor property was menaced by legal process. Regarding, then, the payment as purely voluntary, it is as certain as any principle of law can be that it could not be recovered back."

It seems to us that this case is precisely parallel with the one before us. We are unable to perceive any distinction between them. And as it is the law of Kansas which we are called upon to administer, the settled decisions of its Supreme Court, upon the very matter, are entitled to the highest respect. We are not aware of any decision which tends to shake the authority of *Phillips v. Jefferson County*. On the contrary, the same views have been subsequently reiterated. In *Wabannsee County v. Walker*,⁵ a case precisely like it, with the exception that when the taxes were paid to the county collector to redeem the tax certificates, under a mistaken view

¹ 10 Pet. 137.

² 9 Johns. 201.

³ 9 Johns. 369.

⁴ 5 Kan. 412.

⁵ 8 Kan. 431.

of the law, he charged twice as much interest as he was entitled to, the party paid under protest. Yet it was held that he could not recover back even the illegal interest. The court relied on the previous decision in *Phillips v. Jefferson County*, and, after examining various other authorities, summed up the matter as follows: "A correct statement of the rule governing such cases as this would probably be as follows: Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest does not make the payment involuntary."

The question was again discussed in the recent case of the *Kansas Pacific Railway Co. v. Commissioners of Wyandotte County*; ¹ and although, in that case, a personal tax paid by the railroad company under protest was recovered back, such recovery was allowed on the ground that, if the tax was not paid, it would be the immediate duty of the county treasurer to issue a warrant to the sheriff to levy upon and sell the personal property of the company therefor. But the principles of the former cases were recognized and affirmed.

It has undoubtedly been held in other States (though perhaps not directly adjudged) that a payment of illegal taxes on lands, to avoid or remove a cloud upon the title arising from a tax sale, is a compulsory payment. The case of *Stephan v. Daniels et al.* ² is of this character; though in that case the plaintiff relied on the provisions of a local statute; and besides this, a legal tax was combined with an illegal assessment, and perhaps a sale would have conferred a valid title upon the purchaser. Where such would be the effect of a tax sale, we cannot doubt that a payment of the tax, made to prevent it, should be regarded as compulsory and not voluntary. The threatened divestiture of a man's title to land is certainly as stringent a duress as the threatened seizure of his goods; and if imminent, and he has no other adequate remedy to prevent it, justice requires that he should be permitted to pay the tax, and test its legality by an action to recover back the money. But as, in general, an illegal tax cannot furnish the basis of a legal sale, the case supposed cannot often arise. If the legality of the tax is merely doubtful, and the validity of the sale would depend on its legality, according to the law of Kansas, the party, if he chooses to waive the other remedies given him by law to test the validity of the tax, must take his risk either voluntarily to pay the tax, and thus avoid the question, or to let his land be sold, at the hazard of losing it if the tax should be sustained. Having a knowledge of all the facts, it is held that he must be presumed to know the law; and, in the absence of any fraud or better knowledge on the part

¹ 16 Kan. 587.

² 27 Ohio St. 527

of the officer receiving payment, he cannot recover back money paid under such mistake.

In conclusion, our judgment is that the questions submitted by the Circuit Court must be answered as follows :—

To the first : that judgment should be rendered for the defendant.

To the second : that the acquisition of the tax certificates and the subsequent payment of the taxes by the plaintiff were a voluntary payment, in such a sense as to defeat the right to recover in this action.

To the third : that the statute of Kansas, referred to in the question, does not, upon the facts found, give to the plaintiff the right to recover in respect of the causes of action set out in the opinion.

Judgment affirmed.

Cur.

RAILROAD COMPANY v. COMMISSIONERS.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1878.

[*Reported in 98 United States Reports, 541.*]

ERROR to the Circuit Court of the United States for the District of Nebraska.

The facts are stated in the opinion of the court.

Mr. *A. J. Poppleton* for the plaintiff in error.

Mr. *J. M. Woolworth* and Mr. *W. H. Munger*, *contra*.

Mr. Chief Justice WAITE delivered the opinion of the court.

This was a suit to recover back taxes for the years 1870 and 1871, paid by the Union Pacific Railroad Company upon certain lands in Dodge County, Nebraska. The lands were among those granted by Congress to the company to aid in the construction of its railroad,¹ but the patents were withheld until after the taxes had been paid, by reason of the joint resolution of Congress "for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad Company, and for other purposes," approved April 10, 1869.²

The lands were returned by the United States land officers to the State auditor and by him to the county clerk for taxation, as required by the General Statutes of Nebraska, and were placed upon the assessment list of the county. The general and the local taxes levied for the respective years were carried out against these lands, with others upon the lists, and the railroad company designated as owner. In due time the tax-lists, with warrants attached for their collection, were delivered to the treasurer of the county. The taxes for the year 1870 became payable May 1, 1871, and those for 1871, May 1, 1872. The warrants authorized the treasurer, if default should be made in the payment of any of the taxes charged upon

¹ 12 Stats. 489.

² 16 Stats. 56.

the lists, to seize and sell the personal property of the persons making the default to enforce the collection.

No demand of taxes was necessary, but it was the duty of every person subject to taxation to attend at the treasurer's office and make payment. During the years 1870, 1871, and 1872, the railroad company was the owner of other lands in the county, and other property, both real and personal, on which taxes were properly levied. On the 11th of August, 1871, the company attended at the treasurer's office, and paid all taxes charged against it for the year 1870, and on the 20th of July, 1872, all that were charged for the year 1871. Before these payments were made there had been no demand for the taxes, and no special effort had been put forth by the treasurer for their collection. The company had personal property in the county which might have been seized; but no attempt had been made to seize it, and no other notice than such as the law implies had been given that payment would be enforced in that way.

At the time the several payments were made the company filed with the treasurer a notice in writing that it protested against the taxes paid, for the reason that they were illegally and wrongfully assessed and levied, and were wholly unauthorized by law, and that suit would be instituted to recover back the money paid.

This suit was begun Aug. 20, 1875, and on the trial the judges of the Circuit Court were divided in opinion as to the question, among others, "whether the payment of the said taxes under the written protests above appearing, without any demand therefor or effort to collect the same, made the payment a compulsory one in such sense as to give the plaintiff (the railroad company) the right to recover back the amount thereof as at common law, there being no statute giving or regulating the right of recovery in such cases." The presiding judge being of the opinion that the payment was voluntary and not compulsory, judgment was entered against the railroad company, and the case has been brought to this court upon a writ of error for a determination of the question upon which the judges were divided, and which has been duly certified upon the record.

We have no difficulty in answering the question in the negative. We had occasion to consider the same general subject at the last term in *Lamborn v. County Commissioners*,¹ which came up on a certificate of division from the Circuit Court for the District of Kansas. As that was a case from Kansas, we followed the rule adopted by the courts of that State, which is thus stated in *Wabaunsee County v. Walker*:² "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at

¹ 97 U. S. 181.

² 8 Kan. 431.

the time of making the payment files a written protest does not make the payment involuntary."

This, as we understand it, is a correct statement of the rule of the common law. There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Elliott v. Swartwout*¹ and *Bond v. Hoyt*,² which were customs cases, the payments were made to release goods held for duties on imports; and the protest became necessary, in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia v. Collector*³ and *Collector v. Hubbard*,⁴ which were internal-revenue tax cases, the actions were sustained "upon the ground that the several provisions in the internal-revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy." It is so expressly stated in the last case, p. 14. As the case of *Erskine v. Van Arsdale*⁵ followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand.

The real question in this case is, whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion. The treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied, and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability. As to this class of cases Chief Justice SHAW states the rule, in *Preston v. Boston*,⁶ as follows: "When, therefore, a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received." This, we think, is the true rule, but it falls far short of what is required in this case. No attempt had been made by the treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred

¹ 10 Pet. 137.

² 13 Pet. 266.

³ 5 Wall. 730.

⁴ 12 Wall. 13.

⁵ 15 Wall. 75.

⁶ 12 Pick. 14.

to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. All that appears is, that the company was charged upon the tax-lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the company presented itself at the treasurer's office, and in the usual course of business paid in full everything that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges, and a notice that suit would be commenced to recover back the full amount that was paid. No specification of alleged illegality was made, and no particular property designated as wrongfully included in the assessment of the taxes. The protest was in the most general terms, and evidently intended to cover every defect that might thereafter be discovered either in the power to tax or the manner of executing the power. Three years afterwards, and after the decision in *Railway Company v. McShane*,¹ which was supposed to hold that the particular lands now in question were not subject to taxation, this suit was brought. Under such circumstances we cannot hold that the payment was compulsory in such a sense as to give a right to the present action. As the answer to this question disposes of the case, it is unnecessary to consider the other questions certified.

Judgment affirmed.

refusing to pay any on ground that it was illegal as to the tax and a warrant to sheriff. Then, after the warrant was paid, refused PARCHER AND OTHERS v. MARATHON COUNTY. The tax was paid on prop. and that under such circumstances a payment is made.

IN THE SUPREME COURT OF WISCONSIN, MAY 10, 1881.

[Reported in 52 Wisconsin Reports, 388.]

APPEAL from the Circuit Court for Marathon County.

This action was brought to recover back the amount of a tax assessed upon the personal property of the plaintiffs in the year 1877, in the city of Wausau, which the plaintiffs allege they paid by compulsion and under protest. It was admitted on the trial, by the defendant county, that the tax was illegal. It appears that the treasurer of Wausau demanded the amount of such tax from the plaintiffs, who refused to pay it on the ground that it was illegal and void. The city treasurer returned the tax as delinquent to the county treasurer of Marathon County, who afterwards issued his warrant to the sheriff to collect the same pursuant to the statute. It is alleged in the complaint that "the said sheriff did present said warrant for the collection of said personal-property tax, for the year 1877, to these plaintiffs, and demanded payment thereon, but that these plaintiffs refused to pay the same for the reason that the same was illegal

¹ 22 Wall. 444.

and void ; that said sheriff threatened to levy upon the personal property of these plaintiffs, and advertise and sell the same to satisfy said personal-property tax, whereupon, to save said personal property from sale, and under compulsion and protest, they paid the sheriff the amount of said tax, together with interest and his costs, and took his receipt therefor ; but that they notified said sheriff that they considered said tax illegal and void, and that they should attempt to recover the same." It is further alleged that the sheriff paid the amount of the taxes so paid by plaintiffs, into the county treasury for the use of the county. The substance of the answer is, that the plaintiffs, with full knowledge of all the facts which invalidated the tax levy, voluntarily paid the sheriff the amount of taxes so assessed against them. A trial of the action resulted in a verdict and judgment for the defendant ; and plaintiffs appealed from the judgment.

The case is further stated in the opinion.

For the appellants there was a brief by *James & Crosby*, and oral argument by Mr. *Crosby*.

C. F. Eldred for the respondent.

LYON, J. It is not denied that the complaint states a cause of action. The testimony given on the trial tended to prove all the material averments in the complaint, and was undoubtedly sufficient to support a verdict for the plaintiffs had the jury found for them. The only question litigated on the trial was, whether or not the plaintiffs paid the illegal tax voluntarily. On this question, after submitting to the jury the question whether the payment was made by them with the view of preventing a levy upon and seizure of their goods, with an instruction that if made for that purpose the plaintiffs should recover, the learned circuit judge further instructed the jury as follows: "It is not enough that an officer gets a warrant in his hand and notifies all taxpayers, 'The amount of this tax must be paid, or I will enforce the collection by levy.' That is not enough. It must be a present purpose, an intent, of levying, — of taking the goods then and there ; not that he will do so in the course of some future days, but that he intends to levy, and having that intention and purpose, and warrant of authority to do it, the party pays to prevent his goods being seized ; — if he does it under such circumstances it is compulsory payment. If it is not under such circumstances, it is what the law calls a voluntary payment. However the man may squirm about the tax, it is called a voluntary payment, and he cannot recover it back. A threat to levy, to levy now at the time, and with the purpose to take the goods then and there, and the money paid then and there to prevent the act, is what is meant by compulsory payment in the law ; and a person who pays that way, the tax being illegal, can recover it back ; not otherwise."

In *Van Buren v. Downing*,¹ this court had occasion to consider the question of the liability of an officer or agent to refund an illegal tax or duty

¹ 41 Wis. 122.

collected by him and paid over to his principal. The defendant in that case was an assistant treasury agent, and as such collected of the plaintiff a license fee imposed by a statute afterwards adjudged invalid, and paid the fee into the State treasury. The action was to recover back the sum so paid. Because the plaintiff did not pay the fee under protest, or deny his liability therefor, or notify the agent of his intention to bring suit to recover it back, we held the payment voluntary, and that the agent was not liable after he had paid the money into the treasury in good faith. The cases cited in the opinion abundantly show that the rule of the liability of officers or agents in such cases is correctly stated in *Erschine v. Van Arsdale*.¹ That was an action against a collector of internal revenue to recover the amount of an illegal tax assessed against and paid by Van Arsdale. This is the rule laid down by the court: "Taxes illegally assessed and paid may always be recovered back if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them." Judge Cooley, in his treatise on the Law of Taxation, says that "all payments of taxes are supposed to be voluntary which are not made under protest or under the apparent compulsion of legal process," and that "when a protest is relied upon, nothing very formal is requisite." Page 548. He also quotes approvingly the rule laid down by the Supreme Court of the United States in *Erschine v. Van Arsdale*.¹

Such is the rule in an action against the officer or agent to whom the money was paid in the first instance. Certainly no stronger rule prevails in favor of the principal after the money has been paid over by such officer or agent. Indeed, there are authorities to the effect that the rule is more favorable to the plaintiff in the latter case than when the action is against the officer or agent. This distinction is mentioned in *Atwell v. Zeluff*.² We need not discuss this distinction. We prefer to consider this case on the theory that to entitle the plaintiff to recover against the county he must make as strong a case as he would be required to make were his action against the sheriff. *Atwell v. Zeluff* is an instructive case on the general question of what are and what are not voluntary payments. The rule is there stated as follows: "Where an officer demands a sum of money under a warrant directing him to enforce it, the party of whom he demands it may fairly assume that, if he seeks to act under the process at all, he will make it effectual. The demand itself is equivalent to a service of the writ on the person. Any payment is to be regarded as involuntary which is made under a claim involving the use of force as an alternative, as the party of whom it is demanded cannot be compelled or expected to await actual force, and cannot be held to expect that an officer will desist after once making demand. The exhibition of a warrant directing forcible proceedings, and the receipt of money thereon, will be in such case equivalent

¹ 15 Wall. 75.² 26 Mich. 118.

to actual compulsion." We do not say that we would assent to that rule as broadly as there stated. Perhaps a protest, at least, should be required, especially if the action be brought against the officer or agent after he has paid over to his principal the money illegally collected. The opinion in the Michigan case recognizes the hardship of the rule, and suggests a modification of it by the legislature.

But whether the rule of the Michigan case is or is not correct, we think it must be held, on principle and authority, that the payment of a demand under compulsion of legal process, such payment being accompanied by a protest that the demand is illegal and that the payer intends to take measures to recover back the money paid, is not a voluntary payment. And further, to constitute compulsion of legal process it is not essential that the officer has seized, or is immediately about to seize, the property of the payer by virtue of his process. It is sufficient if the officer demands payment by virtue thereof, and manifests an intention to enforce collection by seizure and sale of the payer's property at any time. On the general question we are considering, numerous authorities are cited in Cooley on Taxation, in the notes on pages 568-571. The case of *Powell v. Sup'rs of St. Croix Co.*,¹ is an illustration of what constitutes a voluntary payment. It follows, from the views above expressed, that when the learned circuit judge instructed the jury that unless, when the tax was paid, the sheriff had the present intention and purpose to seize the plaintiffs' goods then and there, the plaintiffs could not recover, and that an intention to seize at a future day was not sufficient, he laid down a limitation of the liability of the defendant which the law does not sanction.

For this error the judgment must be reversed, and the cause remanded for a new trial.

By the court.

So ordered.

FRANCIS BRUECHER, RESPONDENT, v. THE VILLAGE OF PORT CHESTER, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 19, 1886.

[Reported in 101 New York Reports, 240.]

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made the first Monday of March, 1883, which reversed a judgment in favor of defendant, entered upon an order sustaining a demurrer to plaintiff's complaint, and which overruled the demurrer.

The substance of the complaint is set forth in the opinion.
¹ 46 Wis. 210. *This action as courts had already held was illegal that the payment was involuntary and entitled to a recovery.*

David B. Ogden and Charles W. Sloane for appellant.

I. T. Williams for respondent.

EARL, J. The plaintiff in his complaint alleged that in 1875 he owned certain lands situated in the village of Port Chester, and that they were assessed for certain local improvements; that the commissioners of estimate and assessment appointed under the defendant's charter to apportion and assess the expenses of the improvement upon the adjacent premises did not take the oath required by the charter to be taken by them, nor did they, after making their estimate and assessment, publish a notice of the time and place when and where interested parties could be heard, in manner and form as required by the charter, whereby, and by means of such omissions, the report of the commissioners and the confirmation thereof, and the assessment upon his lands, were illegal and wholly void at law; and he further alleged that the defendant was estopped from denying that the assessment was totally void in law, for the reason that, since the payment of the assessment, the defendant was impleaded by one Sarah Merritt and others in an action presenting the same identical issues and question presented in this action, wherein it was adjudged that the assessment was utterly void for the reasons and upon the grounds above stated. Merritt v. The Village of Port Chester.¹ And he further alleged that on the 27th day of February, 1875, a warrant was issued for the collection of the assessment upon his premises, and the defendant by virtue thereof threatened to sell and was about to sell his premises for the payment of the assessment, and that he, having before that time sold his premises and being under contract to convey the same free from all incumbrances, was unable to do so by reason of the assessment, which was an apparent lien and cloud upon the premises, and thus he was compelled, in order to complete the conveyance of his premises, to pay and did pay to the treasurer of the village and into the treasury thereof the sum of \$489.30 under protest, nevertheless, and the same was received by the treasurer and into the village treasury, as so paid under protest, to wit: that the said assessment was utterly void and of no effect, and that all the rights of the plaintiff should be and remain reserved to him, and in no way waived, foregone, or pretermitted by such payment; and he demanded judgment for the sum so paid and interest. To the complaint the defendant demurred on the ground that it appeared upon the face of the complaint that it did not state facts sufficient to constitute a cause of action.

It does not appear from anything alleged in the complaint that this assessment was invalid upon its face, or that its invalidity would appear in any proceeding taken to enforce it. The contrary must have been determined in the case of Merritt v. Village of Port Chester; but it is distinctly alleged in the complaint, and was decided in this court in that case, that the assessment was in fact utterly illegal and void. Hence it was not

¹ 71 N. Y. 309.

necessary for the plaintiff to institute any action or proceeding to vacate the assessment and thus have it annulled and set aside before commencing this action. If the assessment had been merely irregular, informal, or unjust, the assessors having jurisdiction to impose the same, then, before an action to recover back the money paid in satisfaction thereof could be maintained, it would have been necessary to have the same vacated or annulled in some way, and thus removed as an obstacle out of the way. But where an assessment is in fact utterly void on the ground that the assessors had no jurisdiction to impose the same, then an action may be maintained to recover back money paid in satisfaction thereof without first having the assessment set aside or vacated. And so it has been held. *Newman v. Supervisors of Livingston Co.*; ¹ *Strusburgh v. Mayor, etc.*; ² *Horn v. New Lots.*³

These rules in reference to money paid upon assessments were established from the analogy which was supposed to exist between completed assessments and judgments. Money paid upon a judgment which is merely irregular or erroneous cannot be recovered back while the judgment remains in force. But money involuntarily paid upon a judgment which is utterly void can be recovered back without first causing the judgment to be reversed or vacated.

This was not a voluntary payment by the plaintiff within the rules of law applicable to such payments. We must assume that the assessment was valid upon its face, and that a valid warrant was out for its collection; and it has been repeatedly held that payment to an officer who has a valid process which he can enforce and which he threatens to execute is not a voluntary payment. *Peyser v. Mayor, etc.*⁴ And the money having been taken from the plaintiff wrongfully and the defendant having no right to retain the same, no demand prior to the commencement of the action was necessary.

We are, therefore, of the opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

¹ 45 N. Y. 676.

² 87 N. Y. 452.

³ 83 N. Y. 100.

⁴ 70 N. Y. 497.

SECTION II.

PAYMENT IN DISCHARGE OF AN OBLIGATION.

BROWN v. HODGSON.

IN THE COMMON PLEAS, NOVEMBER 26, 1811.

[Reported in 4 Taunton, 189.]

PAYNE sent butter to London consigned to Pen, by the hands of the plaintiff, a carrier, who by mistake delivered it to the defendant, and he appropriated it to his own use, selling it and receiving the money. Pen had paid Payne for the butter, and Brown, admitting the mistake he had made, paid Pen the value. The plaintiff declared for goods sold and delivered, and for money paid; and delivered to the defendant a bill of particulars, "To seventeen firkins of butter, 55*l.* 6*s.*," not saying for goods sold. It was objected for the defendant, that there was no contract of sale, either express or arising by implication of law between the parties, upon this transaction, and that although the plaintiff might have recovered in trover, he could not bring assumpsit for goods sold; the count for money paid was not adverted to at the trial. The jury found a verdict for the plaintiff.

Vaughan, Serjt., in this term, obtained a rule *nisi* to set aside the verdict; and

Shepherd, Serjt., now showed cause against it.

MANSFIELD, C. J. At the trial my attention was not called to the count for money paid, but upon this count I think the action may be sustained. The plaintiffs pay Pen on account of these goods being wrongfully detained by Hodgson; they pay the value to the person to whom both they and Pen were bound to pay it; and this, therefore, is not the case of a man officiously and without reason paying money for another; and therefore the action may be supported. As to the objection taken respecting the bill of particulars, bills of particulars are not to be construed with all the strictness of declarations; this bill of particulars has no reference to any counts, and it sufficiently expresses to the defendant that the plaintiff's claim arises on account of the butter.

HEATH, J. We must not drive parties to special pleadings to draw their bills of particulars.

*Rule discharged.*¹

¹ Sills v. Laing, 4 Campb. 81, *contra*. — ED.

SIR PHILIP HALES, BART., AND ANOTHER, v. FREEMAN.

IN THE COMMON PLEAS, NOVEMBER 13, 1819.

[Reported in 1 Broderick & Bingham, 391.]
ASSUMPSIT on the money counts; plea, general issue. At the trial before DALLAS, C. J., at the Westminster sittings after Hilary term, 1819, a verdict was found for the plaintiffs for 114*l.* 15*s.*, subject to the opinion of the court on the following case.

Dame Mary Linch, by her last will dated the 31st January, 1786, devised all her real estates to the plaintiffs and Sir Brooke Bridges and John Conant, both since deceased (upon trust), and bequeathed to the defendant, Nancy Freeman, an annuity of 100*l.*, clear of all deductions, during her life, and declared, that the same should be payable quarterly on the usual quarter days, and secured upon her real estates; the first payment was directed to be made on the quarter day after her decease. The testatrix died in June, 1808. By indenture of assignment dated the 15th August, 1809, the defendant, in consideration of 400*l.* advanced, assigned to Mary Mayo the sum of 58*l.* 16*s.*, part of the said annuity, with proviso for redemption on payment of the 400*l.* By an indenture of assignment of several parts, dated 15th April, 1813, to which the defendant, Mary Mayo, and Jane Peckharnis were parties, the defendant and Mary Mayo, in consideration of 250*l.* paid to the defendant, and 400*l.* paid to Mary Mayo, assigned to Jane Peckharnis the whole of the said annuity of 100*l.*, with a covenant from the defendant that the annuity was free from incumbrances. The plaintiffs omitted to pay the legacy duty of 10*l.* per cent per annum, until the time hereinafter mentioned, and regularly paid the annuity to the defendant in full, without demanding, receiving, or deducting the said duty chargeable thereon, down to the 25th March, 1813, and afterwards to Jane Peckharnis. The plaintiffs, on the 24th May, 1816, paid to the Stamp Office the sum of 57*l.* 7*s.* 6*d.*, and on the 28th August, 1816, the further sum of 57*l.* 7*s.* 6*d.*, making together the sum of 114*l.* 15*s.*, the full amount of the duty. The first application to the defendant for payment was made on behalf of Mrs. Peckharnis, on the 21st May, 1817. The plaintiffs afterwards, on the 9th January, 1818, applied for payment to the defendant on their own behalf.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover? If the court should be of that opinion, then the verdict was to stand, otherwise a nonsuit was to be entered.

Leas, Serjt., for the plaintiff.

Taddy, Serjt., *contra*.

DALLAS, C. J. This case depends on the construction of clauses in two different statutes, viz., the 36 G. 3, c. 52, and the 45 G. 3, c. 28. By the former statute, which relates to personal property only, it is directed¹ "that the duty chargeable upon annuities shall be paid by the person or persons having or taking the burthen of the execution of the will, or other testamentary instrument, or the administration of the personal estate of any person deceased, or upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy or any part of any legacy, or the residue of any personal estate, or any part of such residue which such person or persons shall be entitled, so to retain either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then, and in every of such cases the duty, which shall be due and payable upon every such legacy and part of legacy, and residue and part of residue respectively, and which shall not have been duly paid and satisfied to His Majesty, his heirs and successors, according to the provisions of this act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to His Majesty, his heirs and successors, and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon (such duty not having been first duly paid to His Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to His Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom

¹ S. 6.

the same shall be made." The legacy in question is an annuity charged on a real estate, and the 45th of the King puts that on the same footing as personal property. The 8th section of the first act directs, "That the value of any legacy given by way of annuity, whether payable annually or otherwise for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged according to the tables in the schedule hereunto annexed; and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively." In this case the payment is made after four years, the executor not having deducted the duty within that time, and the action is brought on the clause of the statute, which enacts, that if the duty be not deducted, it shall be the debt both of the executor and the legatee. With respect to the latter party, he remains unquestionably liable, notwithstanding the power of the executor to deduct, if the executor, having omitted to deduct, incur a debt to the crown; if he pay that debt out of his own fund, the amount of the duty becomes a debt from the legatee to the executor. It is urged that all the instalments ought to be paid in four years, but the statute goes on, and anticipating the case of an omission of payment by the executor, makes the legatee also a debtor: that puts by all the argument as to the four years. There is no necessity to travel back to former decisions, because I go on this statute alone. This does not resemble the case of a voluntary payment, or a payment made in ignorance of fact or law. So far from being a voluntary payment, it is clearly compulsory on the clause of the statute holding both executor and legatee liable at any time. Both parties, therefore, being liable in this case, the payment made by the plaintiff was in substance a payment for the legatee, and the plaintiff is entitled to recover.

PARK, J. At first sight it seems a hardship on the legatee, that, after some time had elapsed, and after an assignment of the annuity, she should be called on to pay the duty; but it would be much harder if the executor, who has no interest whatever in the annuity, should pay the duty out of his own pocket. It is not necessary to resort to former decisions, because the statute on which the present case turns, is so different from the statutes on which those decisions are grounded, that no comparison can arise between them. In the decisions on the property tax, paving, and land tax acts, the court went on the words of the statute, which make the occupier liable. The executor here is only made liable for the benefit of government, and not on his own account. He has not paid the money voluntarily, as in *Brisbane v. Dacres* and *Billie v. Lumly*, but upon compulsion. He pays, not on his own account, but on that of the legatee. The executor is

no more than surety for the legatee, and his case falls within the principles applied to the case of sureties.

BURROUGH, J. This case turns entirely on the clause of the act of parliament. The party who receives the benefit of the legacy certainly ought to bear the charge of the duty; and the annuitant here not only had the whole benefit of her legacy, but received more than she was entitled to, the duty not having been deducted. It has been urged that this was a voluntary payment; but a payment cannot be called voluntary, where, if the party omit to make it, he may be compelled to do so, and here the plaintiff might have been compelled to pay; now, where a party may be compelled to make a payment, he is always entitled to make it without compulsion. Here the plaintiff is made liable as a trustee, who applies all the money arising under the will for the benefit of others. If the plaintiff had been sued by the crown, and had paid this money, can there be a doubt that it would have been a payment made for the legatee? The executor is not to bear the burthen, but the legatee. The case on the land tax act does not apply; that is a tax falling completely on the tenant of the land, and he must pay on account of his own possession. It is so much a tax on the tenant, that, except for the purpose of enabling the landlord to vote at elections, the landlord's name would not be on the rate.

RICHARDSON, J. This case is distinguishable from *Denby v. Moore* and *Andrew v. Hancock*, by reason of the clause in the sixth section of the act. In *Denby v. Moore*, the tenant had paid an excess of rent voluntarily, so in *Andrew v. Hancock*; and nothing in either case remained due from the tenant to the crown. But in the present instance the duty remains a debt as well in the legatee as the executor. It is urged, that the executor cannot recover from the legatee, because the duty is the debt of both of them; but the contrary seems to result from the act: the executor stands in the situation of a surety, and his principal becomes liable to him for whatever he has paid. In this case, therefore, there must be judgment for the plaintiff.

Judgment for the plaintiff accordingly.

Judgment for the plaintiff accordingly.

accepted a bill drawn by way of proving commutation, and
detached today. very incensed that the Gov. is receiving no notice
of my appointment. **BLEADEN v. CHARLES.** Trial of land in common
refused to give it. A holding of, same to be, & other all
in day, & afterwards under the & a resolution, who covered
up. lost this action, for [Reported in 7 Bingham, 246.]

ASSUMPSIT for money paid by the plaintiff to the use of the defendant, under the following circumstances:—

Early in the last year, one Hay, who was indebted to the plaintiff, upon a certain emergency drew a bill for 68*l.* 15*s.*, which the plaintiff accepted, and delivered to Hay to assist him in his difficulty.

Hay, however, got over the difficulty without having recourse to the bill, and shortly afterwards gave it up to the plaintiff; but before the plaintiff had destroyed it, Hay bargained with the defendant for 20*l.* worth of goods, which the defendant refused to sell without some security for payment; whereupon Hay again obtained from the plaintiff the bill for 68*l.* 15*s.*, which he indorsed, and, disclosing the circumstances under which it had been obtained, placed in the hand of the defendant as a security for the payment of the goods in question; the goods were thereupon delivered to Hay.

Hay afterwards paid for them by a check on his banker, and requested the defendant to restore the bill for 68*l.* 15*s.* Hay, however, being still indebted to the defendant to a considerable amount, the defendant refused to restore the bill, and afterwards indorsed it to one Henderson, to whom he was himself indebted. Henderson sued the plaintiff, who was thereupon obliged to pay the bill and the costs of the action.

The plaintiff then commenced this suit against the defendant, for the amount of the bill and the costs of Henderson's action.

The declaration contained a special count and a count for money paid, but the special count was abandoned.

GASELEE, J., before whom the cause was tried, left it to the jury to say whether the bill was left as a security for the 20*l.* worth of goods supplied by the defendant to Hay, or for the whole of Hay's debt.

The jury found that the bill was left as a security for those goods only, and gave a verdict for the plaintiff for the amount of the bill and the costs of Henderson's action. An objection having been made on the part of the defendant, that the action did not lie, the learned judge saved the point; whereupon

Spankie, Serjt., obtained a rule *nisi* to enter a nonsuit instead of the verdict, on the ground that there was no privity between the plaintiff and defendant, and that, therefore, the money could not be said to have been paid to the use of the latter. At all events the defendant was not responsible for the costs of Henderson's action, which the plaintiff ought not to have resisted.

Wilde, Serjt., showed cause.

Spankie, *contra*.

TINDAL, C. J. It seems to me that this transaction amounts to money paid by the plaintiff for the use of the defendant. The money has been paid by him in a way which has been serviceable to the defendant, and there appears to have been a privity between them arising out of the manner in which the bill was obtained and deposited as a security, the defendant being apprised that nothing was due from the plaintiff to Hay. But it is clear that after Hay had paid the defendant for the goods, the indorsement of the bill by the defendant was wrongful, and the payment by the plaintiff upon Henderson's suing him, compulsory. There has been, therefore, a compulsory payment by the plaintiff, induced by an act of the de-

fendant,—an act of which he has had the full benefit. That is money paid to the defendant's use. If the defendant had sued the plaintiff on the bill, the circumstances under which it was deposited, and the payment by Hay, would have been a good answer to the action; it would be singular, therefore, if he could put the bill in circulation, and make the plaintiff pay the amount for his benefit, indirectly, without rendering himself liable to repayment.

GASELEE, J. The plaintiff is entitled to the judgment of the court. I put it on the ground that where the price of the goods for which the bill was deposited as a security was tendered or paid, the defendant had no longer any right to the bill, but was in the condition of a person who had simply found it. The plaintiff, therefore, was compelled to pay by the wrongful act of the defendant, and as the defendant had the benefit of the payment, the money must be considered as paid to his use.

BOSANQUET, J. I am of opinion that the plaintiff is entitled to recover for money paid to the use of the defendant. The defendant was in possession of an acceptance of the plaintiff which he had no right to retain, much less to make use of. No value had been received by the acceptor, nor after the payment by Hay had any been given by the defendant. Nevertheless he negotiates the bill, and the plaintiff is compelled to pay it. Even if he had negotiated it with the consent of the plaintiff, it would have been the ordinary case of an accommodation bill, in which the acceptor would have been entitled to recover the amount again; and as the case stands the money has clearly been paid to the use of the defendant.

ALDERSON, J. The money was clearly paid to the use of the defendant, inasmuch as it released him from so much of his debt to Henderson. The plaintiff, therefore, is entitled to recover.

Rule discharged.

SPENCER v. PARRY.

IN THE KING'S BENCH, MAY 13, 1835.

[Reported in 3 *Adolphus & Ellis*, 331.]

DEBT for money paid and laid out, and on an account stated. Plea, *nil debet*. At the trial before PATTESON, J., at the sittings in Middlesex after Easter term, 1834, the facts appeared to be as follows. The plaintiff let a house to the defendant under a written agreement by which the defendant undertook to pay 42*l.* a year rent, "free and clear from all land tax and parochial taxes." The defendant held the premises twelve months, and then left them, not paying the land-tax or poor-rates. Upon his refusal to discharge these, the collector of land-tax recovered the arrears of that duty from the succeeding tenant, and the collector of poor-rate distrained for the

year's rates upon the plaintiff's receiver of rents, pursuant to a local act for the parish in which the premises were situate, viz., 11 G. 4. c. x. ss. 92, 93 (local and personal, public), for regulating the affairs of the parishes of St. Giles in the Fields and St. George, Bloomsbury, by which the landlords of certain houses are subjected to the poor-rate; but it is enacted that the person authorized to receive or collect, or the person receiving or collecting the rents, shall be compellable to pay the rates, unless the real landlord shall declare himself and pay, or shall be distinctly or certainly known to be such by the vestrymen, etc.¹ The rates were paid by the receiver on the plaintiff's account, and the plaintiff reimbursed the new tenant for the land-tax levied upon him. This action was brought to recover the amount so paid, and it was proved that the defendant, after the commencement of the action, had promised to give the plaintiff a *ognovit* to settle it, but had not done so. For the defendant it was objected that, if he was liable to the present claim, he was so by virtue of the special agreement, and that the declaration should have been framed upon that. For the plaintiff it was urged that, the contract having been determined, a count for money paid was sustainable, and further, that the promise to give a *ognovit* was proof of an account stated. The learned judge was of opinion that there was no proof of an account stated, and that the evidence did not support the count for money paid to the defendant's use, inasmuch as the defendant was never liable for the tax or rate to any person but the plaintiff. He therefore directed a nonsuit, giving leave to move to enter a verdict.

H. Wilson moved accordingly in Trinity term, 1834, and cited (as to the count for money paid) *Exall v. Partridge*,² *Dawson v. Linton*,³ and *Brown v. Hodgson*.⁴ He also relied upon the offer of a *ognovit* as evidence of an account stated. [TAYLOR J. The offer of a *ognovit* is matter subsequent to the suing out of the writ.] It shows a pre-existing demand. [Lord DENMAN, C. J. It does not follow that there had been an account stated. LITTLEDALE, J. To support that allegation, there should have been something of a settlement before the action was brought.] On the question as to the count for money paid, the court granted a rule *nisi*.

Alexander now showed cause.

Sir W. W. Willest *contra*.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the court.

The plaintiff in this case had demised a house to the defendant, at a certain rent, clear of land-tax and of all parochial taxes, by a written agreement. The defendant quitted the premises at the end of his year, having paid his rent, but leaving the land-tax and rates unpaid. The plaintiff relet the house, the new tenant was obliged to pay the land-tax, and the plaintiff's agent, under a local act of parliament, was distrained upon for the rates, and paid them, both these sums were repaid to the parties by the plaintiff.

¹ See the clauses cited in *R v. Dyer*, 2 A. & E. 607, 608.

² 5 T. R. 308.

³ 5 B. & A. 1, 521.

⁴ 4 Taunt. 189.

This action was brought to recover the amount of the land tax and rates, as money paid to the defendant's use. It was objected, at the trial, that the form of action was misconceived, and that the defendant, though liable on his agreement to pay the whole amount of the rent, including the rates, could not be charged with this money as paid to his use. My Brother PATTISON, being of this opinion, directed a nonsuit, which we think right.

The only doubt we felt in the course of the argument arose from the cases of *Brown v. Hodgson*¹, and *Dawson v. Linton*,² which seemed nearly to resemble the present. In the former case the plaintiff, a carrier, having by mistake delivered A.'s goods to B., who made them his own, paid A. the price, and was afterwards allowed to recover it from B. as money paid to his use. But this was in fact money paid to his use, for it was in discharge of his debt to A.; and it may be fairly said to have been paid at his instance, because he knew that the plaintiff's mistake in delivering the goods to him, made the plaintiff liable to pay the price to the true owner. His so receiving the goods may be considered as equivalent to saying, "If you pay him (as you may be compelled to do) for the goods, I will reimburse you." In the case before us, the defendant was not liable to pay the money to any one but the plaintiff, and that was by virtue of the agreement.

In *Dawson v. Linton*,² goods of the plaintiff, an outgoing tenant, left by him on his farm, were distrained for a tax made payable by the tenant, but which the local act gave him power to deduct from his rent. The plaintiff paid the tax to redeem his goods, and the court thought that money paid to the landlord's use, because the landlord was ultimately liable. The defence was, that the money was paid to the use of the tenant for the time being, who was primarily liable. But here the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them. The tax remained due by his default, which would give a remedy on the agreement; but it was paid to one who had no claim upon him, and therefore not to his use.

Rule discharged.

BRITTAIN v. LLOYD.

IN THE EXCHEQUER, NOVEMBER 21, 1845.

[Reported in 14 Meeson & Welsby, 762.]

This was an action of assumpsit for money paid by the plaintiff, an auctioneer, for the use of the defendant, and on an account stated.

The defendant pleaded *non assumpsit*, on which issue was joined, and the cause was tried, before TINDAL, C. J., at the Derbyshire spring assizes, 1844, when it was agreed that a verdict should be found for the plaintiff

¹ 4 Taunt. 189. ² 5 B. & Ald. 521.

for 107*l.* 3*s.* 9*d.* damages, the sum claimed by the plaintiff, and 40*s.* costs, subject to the opinion of this court on a special case; the court to have power to draw all inferences from the facts which a jury could or might draw.

The defendant, being the owner of a freehold estate, consisting of a farmhouse, out-buildings, and lands, situate at Woolow, near Buxton, in Derbyshire, employed the plaintiff, who long before and at the time of the auction hereinafter mentioned, and ever since, has been an auctioneer duly licensed, to sell the said estate by an auction, to be holden at the Bull's Head Inn, at Fairfield, near Buxton aforesaid, on the 25th of January, 1843. Previous to the commencement, and on the day of the auction, the defendant delivered to the plaintiff the following authority to bid for her, signed by herself and John Poundall: "To Mr. John Britain, Auctioneer, Green, Fairfield. Take notice, that Mr. John Poundall is appointed by Mrs. Charlotte Lloyd, the real owner of the estate intended to be by you put up to sale by way of auction, at the Bull's Head Inn, Fairfield, on the 25th day of January instant; the said Mr. Poundall being actually employed by the vendor of such estate to bid at the said sale for the use and behoof of the said Charlotte Lloyd. And take notice, also, that the said Mr. John Poundall hath agreed and doth intend accordingly to bid at the said sale for the use and behoof of the said Charlotte Lloyd. As witness the hands of the said Charlotte Lloyd and John Poundall, the 25th day of January, 1845. Charlotte Lloyd, John Poundall. Witness, Samuel Wood." Which notice, duly signed by the defendant and the said John Poundall, being the person intended to make the bidding, was duly given to the plaintiff before the commencement of the sale, and before the bidding by the said John Poundall hereinafter mentioned. not the bid

The estate was put up for sale by auction by the plaintiff on the said 25th of January, 1843, and several persons attended and bid, and Poundall attended in the sale-room during the auction, and bid as hereinafter mentioned. The estate was put up for sale by the plaintiff, subject to the following (amongst other) conditions of sale, which were prepared by the plaintiff in the course of his employment as such auctioneer, and read by the plaintiff at the commencement of the auction, viz.: "That the highest bidder should be the purchaser. That no bidding should be retracted. That the vendor or her agent should have the right of bidding once for the property. That a deposit should be paid on the fall of the hammer, as also the whole of the auction-duty, to the auctioneer by the purchaser. That the residue of the purchase-money should be paid at a future day, when the estate should be conveyed. All fixtures, articles, and things, timber and timber-like trees growing on the premises, down to and including those of the value of 1*s.* each, were not to be included in the purchase-money of the premises, but to be paid for in addition to such purchase-money, at a fair valuation, at the time of completing the purchase." not read

The biddings then commenced, the defendant being in a room in the inn adjoining to that in which the auction was held, and having a servant in attendance in the room, to give her information respecting the biddings, etc. Among the bidders were the names of two persons of the name of Barker and Shaw, the latter of whom ultimately became the purchaser of the estate, as hereinafter mentioned. After several biddings, including several by Shaw, Barker bid £3150, and Shaw shortly afterwards bid £3300 : this was communicated to the defendant by her aforesaid servant, and she immediately sent him to desire Mr. Barker to come to her in the private room, and there was a suspension of the auction for a few minutes ; Mr. Barker went to the defendant, who inquired of him whether he was bidding for any one in the room, and offered to let him bid a time or two, if he liked ; and stated that he might go up to £3800, and he should not be charged with the auction duty ; and that if he bid she would not take any advantage of it. He objected, that it was more than the estate was worth ; she then requested him to bid for her, to which he acceded, and returned to the auction-room, and the sale was resumed by Barker bidding £3350 for the defendant. Shaw then bid £3400, which was communicated by her said servant to the defendant, and who was immediately sent to fetch Shaw to the defendant out of the auction-room. Shaw was taken to the room where defendant was, when she asked him if he would give her the auction duty over his last bidding ? Shaw replied, he did not know what the auction duty was, but he would wait upon her the following day. It was agreed upon between them that Shaw would wait on her at her residence, at Woolow, the following day, and the hour of two o'clock in the afternoon was fixed. She then told Poundall, in Shaw's presence, to go and bid the reserved bidding, which he did, and bought in the estate at £3800, and the plaintiff knocked down the estate to Poundall, observing, that all the parties attending the sale were then at liberty, according to the usual practice, to bid by private contract ; but Shaw would, according to the usage, have the first option. There had been no bidding after Shaw's, of £3400, before Poundall bid the reserved bidding.

The next morning, Shaw met Poundall (who acted for the defendant) at her residence at Woolow, and there saw the defendant. Poundall and Shaw looked over the estate, and Poundall named £3550 or £3560 for the estate, including timber, fixtures, etc., which were estimated in a lump at the sum of £45 : he had not received any previous instructions so to do. Shaw then offered £3500 for the estate, and £40 for the fixtures, etc., and said, if he could not have it at that price, he would not have it at all. Poundall then consulted the defendant, and they agreed to split the difference, and that the purchase-money should be £3545. The bargain was made, according to the testimony of Shaw, without any reference to the sale by auction at all.

The defendant then sent for the plaintiff to come to the defendant's house,

on the 27th of January, 1843, being two days after the sale, to prepare the agreement between the defendant and Shaw; and the plaintiff and Shaw, on the 27th of January, 1843, came to the defendant's house, when an agreement, to which the plaintiff was an attesting witness, of which the following is a copy, was copied by the defendant's daughter, at the request of plaintiff, from a book of the plaintiff's.

Memorandum. — That Mr. William Shaw is declared the highest bidder and purchaser of the Woolow estate, situate in the parish of Hope and township of Fairfield, in the county of Derby, at the sum of £3545, including the timber plantations and fixtures on the premises; at which sum the said Mr. William Shaw doth agree to become the purchaser thereof accordingly, and doth also agree, on his part, to perform the before-written conditions of sale; and, in consideration thereof, Charlotte Lloyd, the vendor, doth agree to sell and convey the said estate and premises unto the said Mr. William Shaw, his heirs and assigns, or as he or they shall direct, according to the said before-written conditions of sale. And it is also agreed, that the sum of £350 shall be paid as a deposit, which sum is to be considered as part of the purchase-money. Dated this 27th day of January, 1843.

[Signed]

CHARLOTTE LLOYD,
WILLIAM SHAW.

JOHN POUNDALL,
RICHARD SHAW,
JOHN BRITAIN, } *Witnesses.*

There are no other conditions than those set out in the early part of this case.

In March, 1843, the plaintiff duly made the return of the sale to the proper officers of Excise, and that the estate was bought in by defendant for £3800, and duly verified and produced, and left, as required by the act of parliament, the notice of the said appointment of Poundall, etc.; and also verified the fairness and reality of the transactions to the best of his knowledge and belief, and did all other acts required by law by him to be done, to get the duty on the said auction and sale allowed and remitted to the defendant; but the Commissioners of Excise refused to allow or remit the same.

On the 22d of March, 1843, the plaintiff had an interview with the defendant, in order to settle his account against the defendant for the sale of the estate hereinbefore mentioned, and also for another sale the plaintiff had had for the defendant. Some unpleasantness took place between the plaintiff and defendant, in consequence of the defendant complaining of the exorbitancy of the plaintiff's bill, alleging that the plaintiff had charged her too much. The defendant said to the plaintiff, "You had thought to have thrown the auction duty away; but I would not let you." The plaintiff told the defendant that he had not yet settled the sale account with the

Excise, and that when he did settle it, if the auction duty was demanded of him, he should demand it of defendant; to which the defendant replied, "Then you must get it, and take it."

Ultimately, in September, 1844, the Commissioners of Excise, or the persons duly authorized in that behalf, required the plaintiff to pay the said auction duty, amounting to 107*l.* 3*s.* 9*d.*, in respect of the said sale of the said estate above-mentioned, being the amount of duty on £3500, and formally demanded the same of the plaintiff, which requisition and demand was duly communicated to the defendant by the plaintiff, and she was required to pay the amount, or to indemnify the plaintiff against proceedings for the recovery of the duty, which was refused by the defendant. Correspondence then took place between the plaintiff and defendant, and the defendant and the Commissioners of Excise; and ultimately the plaintiff was compelled by the Commissioners of Excise to pay the above duty of 107*l.* 3*s.* 9*d.* to the Commissioners of Excise, of which payment due notice was given to the defendant, and she was required to pay the same to the plaintiff, but which she refused; and this action was brought to recover that amount.

The question for the opinion of the court is, whether the plaintiff is entitled to recover the amount of the said auction duty.

The case was argued on the 17th of November, by

Whitehurst for the plaintiff.

Humfrey, *contra*.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. This case was argued on Monday last. It was an action by an auctioneer against the defendant, his employer, for the duty which he had been obliged to pay to the crown on a sale of her estate; and the form of action was for money paid. The court intimated its opinion, that it was clear that the defendant was liable, but took time to consider whether this was the proper form of action.

It was argued by Mr. *Humfrey*, that this form of action could not be maintained, unless the effect of the payment was to relieve the defendant from some liability for the amount to the party to whom payment was made, and that otherwise it could not be paid for the defendant's use; and he relied on the case of *Spencer v. Parry*¹ as an authority for that proposition; and contended that, as the defendant in this case was not made liable to the crown by the act of parliament, the money was paid to one who had no claim upon her, and therefore not to her use.

This proposition, however, is not warranted by the decision of *Spencer v. Parry*, though some expressions in the report of the judgment give a countenance to the argument of the learned counsel; nor can the proposition be maintained; for it is clear that, if one requests another to pay money

¹ 3 A. & E. 331.

for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid; and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger, or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference. If one ask another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount. The borrower, by requesting the acceptor to assume that character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay as he would be on a direct request to pay money for him with a promise to repay it. In every case, therefore, in which there has been a payment of money by a plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable.

In the case of *Spencer v. Parry*, there was no such implied request. In the case of *Grissell v. Robinson*, referred to in the argument, it was considered, and we think rightly, that there was; and the Court of Queen's Bench thought the decision of *Brown v. Hodgson* was to be supported on the same ground. We have now to apply this doctrine to the facts of the present case; and we all think that the plaintiff, having been placed by the defendant in the situation of being obliged to pay the auction duty to the crown, under circumstances in which the defendant was bound to repay him, may be considered as having paid money to the crown at her request, and consequently may maintain this action.

Judgment for the plaintiff.

ASPREY v. LEVY.

IN THE EXCHEQUER, MAY 4, 1847.

[Reported in 16 Meeson & Welsby, 851.]

ASSUMPSIT for money paid, and on an account stated. Plea, *non assumpsit*. The particular of the plaintiff's demand claimed £25 for money paid by the plaintiff for the use of the defendant, and at his request, to one John Williams, in respect of a certain bill of exchange, dated January 28, 1846. At the trial, at the Middlesex sittings after last Michaelmas term,

before the LORD CHIEF BARON, the following appeared to be the facts. The defendant, a sheriff's officer, was in possession of the goods of one Faucher under a *fi. fa.* at the suit of Hart. A prior execution had issued by Goldshede against the same goods; but a subsequent distress for rent having exhausted them all, Goldshede withdrew from possession, without claiming possession-money. The attorney for Hart gave an unconditional order to the defendant to withdraw also, but the defendant refused, except on the terms of receiving £5 for possession-money from Faucher. Faucher told him he hoped the plaintiff would accept a bill for his accommodation. The defendant said, if Faucher could obtain the plaintiff's security for seven guineas, which he then demanded for possession-money, he, the defendant, would leave possession. The plaintiff afterwards, on Faucher's request, accepted the bill, dated January 28, 1846, drawn by Faucher, for £25, at two months' date, on the understanding that Faucher would get it discounted by the plaintiff, or elsewhere, and, after retaining the seven guineas, give the plaintiff the difference. Faucher handed this bill to the defendant as a security for the £5 possession-money as first demanded, and the defendant withdrew his man from possession, but would not discount or give up the bill till he received seven guineas. The bill was not discounted, but was indorsed by the defendant to Williams, and handed to Teague, the attorney to Williams. At its maturity, on the 31st of March, it was presented for payment by Teague on behalf of Williams, and was dishonored. Williams then sued the present plaintiff on the bill, and declared on the 2d of May. On the 7th of May, the defendant, through Teague, offered to pay £13 to the plaintiff's attorney, and to deliver up the bill to him on receiving £12 and interest. The plaintiff did not answer this, but on the 16th of May settled the action with Williams, by paying him £25, the amount of the bill, and 10*l.* 4*s.* costs. On that day the defendant was served with the following notices. The first was as follows:—

TO MR. LAWRENCE LEVY.

I hereby give you notice, that the bill of exchange drawn by myself upon, and accepted by, Mr. Frederick Asprey (the plaintiff) for the sum of £25, dated the 28th day of January, 1846, payable two months after date, was accepted without any consideration, and was handed to me by the said F. Asprey for the purpose of being discounted, and for which purpose I indorsed and handed you the same. Now I hereby desire and authorize you to deliver the said bill to Mr. F. Asprey, as I have no claim on him in respect thereof. May 8th, 1846.

Yours, etc.

F. FAUCHER.

The second was of the same date, and in these terms:—

I hereby give you notice, that I am sued by Mr. Williams for the amount of the bill of exchange for £25, drawn by Mr. Faucher on, and accepted by,

Not a bill in 1846
*7*l.**
*Bill for 25*l.**
*a bill for 25*l.**
with understanding
that 5 should
*return 7*l.* 4*s.**
*10*l.* 4*s.* to Bill. London*

Notice from F.
Asprey

Notice from F.
Asprey on bill.

myself, which bill is more particularly mentioned in the annexed notice; and Mr. Williams having given you notice for the same, which you have fraudulently retained, I hereby give you notice, that if I am compelled to pay the amount of such bill and costs to Mr. Williams, I shall hold you responsible for the same. Yours, etc.

FREDERICK ASPREY.

To MR. LAWRENCE LEVY.

The following letter was then sent by the defendant to Faucher, the drawer of the bill:—

17 NORFOLK-STREET, STRAND, May 16th, 1846.

Sir,—I have this day received your notice, dated 8th of May, relative to the bill for £25, accepted by Mr. Asprey; and I beg to inform you that I had paid it to Mr. Teague by a cheque on the London and Westminster Bank for the sum of £13, being the balance of the bill for £25, after deducting £12, the amount payable by you to myself, and which cheque has been this day returned to me by Mr. Teague; and I, therefore, hold the same on your account, and am ready to deliver you the £13 at any time on request.

(Signed)

L. LEVY.

This letter was directed to Mr. F. Faucher, at Mr. Asprey's, 6 Furnival's-inn, Holborn, and was left about 7 o'clock at Mr. Asprey's on the evening of the 16th of May, 1846, though the messenger was informed that no papers were received there for Faucher. Faucher never received it, and no notice was taken of it.

On the same 16th of May, a letter was written by the plaintiff's attorney to the defendant, applying to him for payment of the amount of a bill for £25 and expenses, which he had been compelled to pay to Mr. Williams in consequence of the defendant's having improperly negotiated the same, and retained the proceeds to his own use, and threatening proceedings if such payment was not made.

Faucher proved that he had received no value for the bill, and that there was no other consideration for his parting with it to the defendant but the £5 between him and defendant.

For the defendant, it was submitted that the action would not lie, because the plaintiff had paid the amount of the bill without compulsion, and the defendant had a right to retain it as against Faucher for 7*l.* 7*s.*, or at least for £5. The defendant had indorsed it to Williams, who sued on it before any notice had been given by the plaintiff respecting the bill. The LORD CHIEF BARON observed that there was no dispute as to £5. A verdict was found for the plaintiff for £20, with leave to the defendant to move to enter a nonsuit, the court to be at liberty, on disposing of that motion, to enter a verdict for £25, if they should think fit. A rule having been obtained according to the leave reserved,

Watson and *Taprell* showed cause.

Humfrey and *Archbold*, in support of the rule.

POLLOCK, C. B. This rule must be absolute. I should be glad to have been able to have sustained the verdict in a case where the defendant, having obtained the security of the plaintiff's bill for £25 for a claim against a third person of, at utmost, seven guineas, indorsed it over, and kept the whole proceeds. *Bleaden v. Charles*¹ was cited in support of the plaintiff's claim, and, in one aspect, bears much on it. Indeed, till the original circumstances of this case are carefully considered, it seems exactly in point. But Mr. *Humfrey* has ably pointed out the material difference in point of fact between the two cases. Here it was intended by the plaintiff, that the defendant should have the bill, and discount it. He had it, and either discounted or paid it away. To whom is he liable for the proceeds? The bill did not become due till the 31st of March. The writ was not in evidence, but the declaration was of the 2d of May. No claim of the bill was made by the plaintiff till after it was paid away by the defendant, and an action had been brought against him upon it by the holder, Williams. Then the plaintiff's present remedy is not against this defendant, but Faucher. It is unnecessary to consider what might have been the result had the plaintiff followed the bill while in the defendant's hands, before it was negotiated.

PARKE, B. I am of the same opinion. If a man gives his acceptance to another for the accommodation of that other, and the bill is disposed of according to the original intention of the parties, and the acceptor afterwards pays it accordingly, he cannot call on the indorsers, but his remedy is on the original contract against the drawer. Here the plaintiff's remedy is against Faucher, for the breach of his contract to indemnify the plaintiff against the consequences of accepting the bill for his accommodation. My only doubt arises on *Bleaden v. Charles*; but that case is distinguishable on the ground there put by GASELEE, J., and BOSANQUET, J., and now by the LORD CHIEF BARON, which shows that the money has been paid by the plaintiff to the use of Faucher, and not to that of the defendant. An answer has been given by my Brother PLATT to the observation raised on *Pownall v. Ferrand*. As to *Exall v. Partridge*, the stranger's goods, when put by him on the land, became security to the landlord for the original tenant, who ought to have paid the rent. The plaintiff's remedy is against Faucher, to whom he lent his acceptance on his implied contract of indemnity.

ROLFE, B., concurred.

PLATT, B. According to the argument for the plaintiff, it might be said that, had the bill been indorsed by Williams, and paid by him, he might have also alleged that he had paid it to the use of the defendant.

Rule absolute.

¹ 7 Bing. 246.

THE GREAT NORTHERN RAILWAY COMPANY v. SWAFFIELD.

IN THE COURT OF EXCHEQUER, APRIL 22, 1874.

[Reported in Law Reports, 9 Exchequer, 132.]

APPEAL from the Bedfordshire county court.

This was an action brought to recover the sum of 17*l.* paid by the plaintiffs to a livery stable keeper for the keep of the defendant's horse, under the following circumstances.

On the 5th of July, 1872, the defendant, who lived at Wootton, fifteen miles from Sandy Station, sent a horse by the plaintiff's line from King's Cross to Sandy, consigned to the defendant himself at Sandy, the fare being prepaid. When the horse arrived at Sandy at 10 p.m., there was no one at the station to receive it on behalf of the defendant, and by the direction of the station-master, who did not know the defendant's residence, the horse was taken to a livery stable near the station, kept by one Bennett, for safe custody. Soon after the horse had been placed there the defendant's servant arrived at the station, and, producing the horse ticket which the defendant had received from the plaintiffs, asked for delivery of the horse. The station-master told the servant that the horse was at the livery stable, and that he could have it on payment of the livery charges, which Bennett's ostler, who happened to be present, stated to be 6*d.* The servant refused to pay this sum, and went across to the stable and demanded the horse of Bennett, who said he might have it on the payment of 1*s.* 6*d.* The servant refused with some insolence to pay any money whatever, on which Bennett said that he should not have the horse except on the payment of 2*s.* 6*d.*, which is the usual and proper charge for one night's keep. The servant thereupon went away without the horse.

On the next morning the defendant came himself, and complained to the station-master (who was not previously aware of what had passed after the servant left the station) of the horse not having been delivered to his servant the previous night. The station-master offered that if the defendant would pay Bennett, and leave the receipt with him, he would represent the case to the superintendent with a view of getting the money from the plaintiffs; but the defendant refused to recognize Bennett in any way. Thereupon the station-master said that, rather than the defendant should go away without the horse, he would pay the charges out of his own pocket; but the defendant declared he would have nothing to do with it, and went away without the horse.

xY || In reply to a letter written the same day by the defendant to the general manager of the plaintiffs, stating that he left the horse in the company's hands, and claiming 21*l.* for the price of the horse, and 30*s.* for his and his

man's expenses and loss of time, the station-master wrote to the defendant on the 8th of July, offering to deliver the horse without payment of the livery charges, but stating that the company would look to the defendant for payment of the same. The defendant replied, refusing to come to Sandy for the horse, but offering to receive it if delivered at his farm by one o'clock the next day, free of expense, and with payment of 30s. for expenses and loss of time; otherwise he would not receive the horse at all. The station-master, in reply, stated that the horse would remain at the stable at the defendant's risk and expense.

The horse remained at the stables till the 18th of November, when the station-master sent it in charge of a porter to the residence of the defendant, who then received and kept it, no demand being then made for payment of the livery charges. The plaintiffs paid the livery charges, amounting to 17l., for which they now sued the defendant.

The case was heard (without a jury) before the learned judge of the county court, who gave judgment for the defendant; the plaintiffs appealed.

The question stated for the opinion of the court was, whether the plaintiffs were entitled to recover the whole or any part of the livery charges from the defendant; and if the court should be of opinion that they were so entitled, judgment was to be entered for them for the amount of the charges, or such part thereof as the court should think fit, with such costs as the court should direct.¹

J. P. Aspinall for the plaintiffs.

Graham for the defendant.

KELLY, C. B. We are all clearly of opinion that this judgment must be set aside, and judgment entered for the plaintiffs for 17l. It appears that the defendant caused a horse to be sent by the plaintiff's railway to Sandy station; but the horse was not directed to be taken to any particular place. The owner ought to have had some one ready to receive the horse on his arrival and take him away; but no one was there. It does not appear that there was at the station any stable or other accommodation for the horse; and the question arises, what was it, under those circumstances, the plaintiffs' duty, and consequently what was it competent for them to do? I think we need do no more than ask ourselves, as a question of common sense and common understanding, had they any choice? They must either have allowed the horse to stand at the station, — a place where it would have been extremely improper and dangerous to let it remain; or they must have put it in safe custody, which was what in fact they did in placing

Handwritten note: 17l. 10s. 6d.

Whether plaintiff submitted to receive horse without paying livery charges.

It was left to jury to find whether it was their duty to put horse in some safe place & not bring it to the station.

¹ The defendant had previously brought an action against the plaintiffs for the detention of the horse; the plaintiffs paid money into court in respect of the detention of the horse before the defendant's refusal to receive him. The cause was tried before BRAMWELL, B., at the Bedford summer assizes, 1873, and a verdict was found for the then defendants, the now plaintiffs.

it in the care of the livery stable keeper. Presently the defendant's servant comes and demands the horse. He is referred to the livery stable keeper, and it may be (I do not say it is so) that upon what passed on that occasion the defendant might have maintained an action against the plaintiffs for detaining the horse.¹ But next day the defendant comes himself; the charges now amount to 2s. 6d.; an altercation takes place about this trumpery sum, and ultimately the station-master offers to pay the charges himself if the defendant will take the horse away; but the defendant refuses, and leaves the horse at the stable. Then a correspondence ensues between the parties, in which the defendant is told that he can have the horse without payment if he sends for it, but he refuses, and says that unless the horse is sent to him with 30s. for expenses and loss of time by to-morrow morning, he will not accept it at all; and he never sends for the horse. Meanwhile the plaintiffs run up a bill of 17l. with the livery stable keeper with whom they placed the horse, which they ultimately have to pay; and at last they send the horse to the defendant, who receives it; and they now sue him for the amount so paid.

*from 8 as last
then ship owner
preservation
defendant incur
loss.*

I am clearly of opinion that the plaintiffs are entitled to recover. My Brother POLLOCK has referred to a class of cases which is identical with this in principle, where it has been held that a shipowner who, through some accidental circumstance, finds it necessary for the safety of the cargo to incur expenditure, is justified in doing so, and can maintain a claim for reimbursement against the owner of the cargo. That is exactly the present case. The plaintiffs were put into much the same position as the shipowner occupies under the circumstances I have described. They had no choice, unless they would leave the horse at the station or in the high road, to his own danger and the danger of other people, but to place him in the care of a livery stable keeper, and as they are bound by their implied contract with the livery stable keeper to satisfy his charges, a right arises in them against the defendant to be reimbursed those charges which they have incurred for his benefit.

*kept under
implied contract
then incur charge.*

PIGOTT, B. I am of the same opinion. I do not think we have to deal with any question of lien. We have only to see whether the plaintiffs necessarily incurred this expense in consequence of the defendant's conduct in not receiving the horse, and then whether, under these circumstances, the defendant is under an implied obligation to reimburse them. I am clearly of opinion that he is. The horse was necessarily put in the stable for a short time before the defendant's man arrived. I give no opinion on what then passed, whether the man was right, or whether the plaintiffs were right; I think it is not material. On the following day the defendant comes himself; and the basis of my judgment is, that at that time the station master offered, rather than the defendant should go away without the horse, to pay the charge out of his own pocket; but the defendant de-

¹ See note on previous page.

clared he would have nothing to do with it, and went away. That I understand to be the substance of what was proved; and if that be so, it shows to me that there was a leaving of the horse by the defendant in the possession of the carriers, and a refusal to take it. Then what were the carriers to do? They were bound, from ordinary feelings of humanity, to keep the horse safely and feed him; and that became necessary in consequence of the defendant's own conduct in refusing to receive the animal at the end of the journey according to his contract. Then the defendant writes and claims the price of the horse; and then again, in answer to the plaintiff's offer to deliver the horse without payment of the charges, he requires delivery at his farm and the payment of 30s.; in point of fact, he again refuses the horse. Upon the whole, therefore, I come to the conclusion that, whoever was right on the night when the horse arrived, the defendant was wrong when, on the next day, he refused to receive him; that the expense was rightly incurred by the plaintiffs; and that there was, under these circumstances, an implied contract by the defendant entitling the plaintiffs to recover the amount from him.

POLLOCK, B. I am of the same opinion. If the case had rested on what took place on the night when the horse arrived, I should have thought the plaintiffs wrong, for this reason, that although a common carrier has by the common law of the realm a lien for the carriage, he has no lien in his capacity as warehouseman; and it was only for the warehousing or keeping of this horse that the plaintiffs could have made any charge against the defendant.

But the matter did not rest there; for it is the reasonable inference from what is stated in the case, that on the next day, when the defendant himself came, he could have had the horse without the payment of anything; but he declined to take it, and went away. Then comes the question, first, What was the duty of the plaintiffs, as carriers, with regard to the horse? and secondly, If they incurred any charges in carrying out that duty, could they recover them in any form of action against the owner of the horse? Now, in my opinion it was the duty of the plaintiffs, as carriers, although the transit of the horse was at an end, to take such reasonable care of the horse as a reasonable owner would take of his own goods; and if they had turned him out on the highway, or allowed him to go loose, they would have been in default. Therefore they did what it was their duty to do. Then comes the question, Can they recover any expenses thus incurred against the owner of the horse? As far as I am aware, there is no decided case in English law in which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor of goods. But in my opinion he is so entitled. It has been long debated whether a shipowner has such a right, and gradually, partly by custom and partly by some opinions of authority in this country, the right has come to be established. It was clearly held to exist in the case of

Notara v. Henderson,¹ where all the authorities on the subject are reviewed with very great care; and that case, with some others, was cited and acted upon by the privy council in the recent case of *Cargo ex Argos*.² The privy council is not a court whose decisions are binding on us sitting here, but it is a court to whose decisions I should certainly on all occasions give great weight; and their judgment on this point is clearly in accordance with reason and justice. It was there said³ (after referring to the observations of Sir JAMES MANSFIELD, C. J., in *Christy v. Row*),⁴ "The precise point does not seem to have been subsequently decided, but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined." Then, after citing the cases, the judgment proceeds: "It results from them, that not merely is a power given, but a duty is cast on the master, in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing." That seems to me to be a sound rule of law. That the duty is imposed upon the carrier, I do not think any one has doubted; but if there were that duty without the correlative right, it would be a manifest injustice. Therefore, upon the whole of the circumstances, I come to the conclusion that the claim of the company was a proper one, and that the judgment of the learned judge of the county court must be reversed.

AMPHLETT, B. I am of the same opinion. It appears to me that this case, though trumpery in itself, involves important principles. I think it is perfectly clear that the railway company, when the horse arrived at the station, and no one was there to receive it, were not only entitled but were bound to take reasonable care of it. As a matter of common humanity, they could not have left the horse without food during the whole night, and if they had turned it out on to the road they would not only have been responsible to the owner, but if any accident had happened to the general public, they would have incurred liability to them. Therefore, as it appears to me, there was nothing that they could reasonably do except that which they did, namely, send it to the livery-stable keeper to be taken care of.

Then comes the question discussed by my Brother POLLOCK, and on which I should not dissent from him without great diffidence, whether a lien existed for these charges. As at present advised, I should not wish to be considered as holding that in a case of this sort, the person who, in pursuance of a legal obligation, took care of a horse and expended money upon him, would not be entitled to a lien on the horse for the money so expended. But really the point does not arise: whatever might be the case

¹ L. R. 7 Q. B. 225, at pp. 230-235.

² L. R. 5 P. C. 134.

³ L. R. 5 P. C., at p. 164.

⁴ 1 Taunt. 300.

with regard to it, that question appears to me to be got rid of by what followed; because, even if the company were wrong in claiming payment of the 6*l.*, or whatever the sum might be, on the night when the horse arrived, the whole thing was set right by them on the next day, when the defendant himself came to the station, and the station-master offered to pay the charge in order that the defendant might have the horse. The defendant refused that very reasonable offer; and what, then, was the company to do with the horse? What else should they do but leave it with the livery-stable keeper, where it was being taken care of? At last, after a bill of 17*l.* had been incurred, the horse was sent to the defendant, and the question is, who is to pay that sum of 17*l.*?

Now, who was in the wrong? Even if the plaintiffs were in the wrong originally, of which I am by no means sure, in not giving up the horse on the night when it arrived, at any rate from the time when that was set right it was the defendant who was in the wrong, and the company who were in the right. It appears to me, therefore, quite clear that the company are entitled to recover the money which they have been obliged to pay, and have paid, to the livery stable keeper, and that the judgment of the learned judge of the county court must be reversed, and judgment entered for the plaintiffs.

Judgment reversed.

DECKER v. POPE.

AT THE LONDON SITTINGS, BEFORE LORD MANSFIELD, JULY 9, 1757.

[Reported in 1 *Schwyn's Nisi Prius* (13th Ed.), 91.]

THIS was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the payment of the price of some goods that were sold to defendant, and the surety having been obliged to pay the money, the administrator declared against the defendant for so much money paid to his use. Lord MANSFIELD directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion.¹

¹ In ancient times no action could be maintained at law, where the surety paid the debt of his principal: and the first case of the kind in which the plaintiff succeeded was before GOULD, J., at Dorchester, which was decided on equitable grounds. BULLER, J., in *Toussaint v. Martinant*, 2 T. R. 100, 105.

GOULD, J., was a justice of the Common Pleas, 1763-1794. — Ed.

SIR EDWARD DEERING v. THE EARL OF WINCHELSEA,
SIR JOHN ROUS, AND THE ATTORNEY-GENERAL.

IN THE EXCHEQUER, FEBRUARY 8, 1787.

[Reported in 2 Bosanquet & Puller, 270.]

LORD CHIEF BARON EYRE (present HOTHAM and PERRIN, Barons) delivered the opinion of the court.

Thomas Deering, younger brother of the plaintiff, was appointed in 1778 receiver of fines and forfeitures of the customs of the outports, and entered into three bonds, each in the penalty of 4000*l.* with condition for duly accounting; in one of which the plaintiff joined as surety, in another Lord Winchelsea, and Sir John Rous in the third. Thomas Deering became insolvent and left the country: the balance due to the crown was 6602*l.* 10*s.* 8*d.*, part of which was levied on his effects, and when the bill was filed there was due 3883*l.* 14*s.* 8½*d.*, which was rather less than the penalty of each of the bonds. The bond in which the plaintiff had joined was put in suit against him, and judgment obtained. He filed his bill demanding contribution against Lord Winchelsea and Sir John Rous, and praying an account of what was due to the crown and money levied on the plaintiff (supposing execution to follow the judgment), and that Lord Winchelsea and Sir John Rous might contribute to discharge the debt of Thomas Deering as two of the sureties for that debt. The appointment, the three bonds, and the judgment against the plaintiff, were in proof, and the balances were admitted by all parties.

The LORD CHIEF BARON after stating the case observed, that contribution was resisted on two grounds; first, that there was no foundation for the demand in the nature of the contract between the parties, the counsel for the defendants considering the title to contribution as arising from contract expressed or implied; secondly, that the conduct of Sir Edward Deering had deprived him of the benefit of any equity which he might have otherwise had against the defendants.

The LORD CHIEF BARON considered the second objection first. The misconduct imputed to Sir E. Deering was, that he had encouraged his brother in irregularities, and particularly in gaming, which had ruined him, and had done this knowing his fortune to be such that he could not support himself in his extravagances and faithfully account to the crown; that Sir E. Deering was privy to his brother's breaking through the orders given him to deposit the money he received in a chest under the key of the comptroller. His Lordship observed that this might be true, and certainly put Sir E. Deering in a point of view which made his demand indecorous;

*Eff. Chqd. and
his conduct to be
proof in defence.*

Lord J.

but it had not been made out to the satisfaction of the court that this constituted a defence. Mr. *Maddocks* had stated that the author of the loss should not have contribution; but stated neither reason nor authority to support the principle he urged. If these were circumstances which could work a disability in the plaintiff to support his demand, it must be on the maxim, "that a man must come into a court of equity with clean hands;" but general depravity is not sufficient. It must be pointed to the act upon which the loss arises, and must be in a legal sense the cause of the loss. In a moral sense Sir E. Deering might be the author of the loss; but in a legal sense Thomas Deering was the author; and if the evil example of Sir E. Deering led him to it, yet this was not what a court of justice could take cognizance of. There might indeed be a case in which a person might be in a legal sense the author of the loss, and therefore not entitled to contribution; as if a person on board a ship was to bore a hole in the ship, and in consequence of the distress occasioned by this act it became necessary to throw overboard his goods to save the ship. This head of defence therefore fails. The real point is, Whether there shall be contribution by sureties in distinct obligations?

It is admitted, that if they had all joined in one bond for 12,000*l.* there must have been contribution. But this is said to be on the foundation of contract implied from their being parties in the same engagement, and here the parties might be strangers to each other. And it was stated that no man could be called upon to contribute who is not a surety on the face of the bond to which he is called to contribute. The point remains to be proved that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. Contract indeed may qualify it, as in *Swain v. Wall*,¹ where three were bound for H. in an obligation, and agreed if H. failed, to bear their respective parts. Two proved insolvent, the third paid the money, and one of the others becoming solvent, he was compelled to pay a third only.

There are in the Register, fo. 176 *b.*, two writs of contribution, one, "*De contributione facienda inter cohæredes*," the other, "*De feoffamento*;" these are founded on the statute of Marlebridge, 52 H. 3, c. 9, which enacts, "that if any inheritance whereof but one suit is due descends unto many heirs as unto parceners, whoso hath the eldest part of the inheritance shall do that one suit for himself and fellows, and the other co-heirs shall be contributaries according to their portion for doing such suit. And if many feoffees be seized of an inheritance whereof but one suit is due, the lord of the fee shall have but that one suit, and shall not exact of the said inheritance but that one suit, as hath been used to be done before. And if these feoffees have no warrant or means which ought to acquit them, then all the feoffees according to their portion shall be contributaries for doing the suit for

¹ 1 Ch. Rep. 149.

them." The object of the statute was to protect the inheritance from more than one suit. The provision for contribution was an application of a principle of justice. In Fitzh. N. B. 162. B. there is a writ of contribution where there are tenants in common of a mill and one of them will not repair the mill, the other shall have the writ to compel him to contribute to the repair. In the same page Fitzherbert takes notice of the writs of contribution between co-heirs and co-tenants; and supposes that between tenants the writ cannot be had without the agreement of all, and the writ in the register countenances the idea; yet this seems contrary to the express provision in the statute. In Sir William Harbet's case,¹ many cases are put of contribution at common law. The reason is, they are all *in æquali jure*, and as the law requires equality they shall equally bear the burden. This is considered as founded in equity; contract is not mentioned. The principle operates more clearly in a court of equity than at law. At law the party is driven to an *audita querela* or *scire facias* to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law. In Equity Cases Abridged there is a string under the title "Contribution and Average." Another case at law occurred in looking into Hargrave's Tracts in a treatise ascribed to Lord Hale on the prisage of wines. The King's title is to one ton before the mast and one ton behind the mast. If there are different owners they may be compelled in the Exchequer Chamber to contribute. Contribution was considered as following the accident, on a general principle of equity, in the court in which we are now sitting.

In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burthen. They are bound as effectually *quoad* contribution, as if bound in one instrument, with this difference only that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally.

In this case Sir E. Deering, Lord Winchelsea, and Sir J. Rous were all bound that Thomas Deering should account. At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown; but as between themselves they are *in æquali jure*, and shall contribute. This principle is carried a great way in the case of three or more sureties in a joint obligation; one being insolvent, the third is obliged to contribute a full moiety. This circumstance and the possibility of being made liable to the whole has probably produced several bonds. But this

¹ 3 Co. 11. b.

Thomas Deering
severally bound

does not touch the principle of contribution where all are bound as sureties for the same person.

There is an instance in the civil law of average, where part of a cargo is thrown overboard to save the vessel.¹ The maxim applied is *qui sentit commodum sentire debet et onus*. In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shows that contribution is founded on equality, and established by the law of all nations.

There is no difficulty in ascertaining the proportions in which the parties ought to contribute. The penalties of the bonds ascertain the proportions.

The decree pronounced was, that it being admitted by the Attorney-General and all parties that the balance due was 3883*l.* 14*s.* 8½*d.*, the plaintiff Sir E. Deering, and the defendants the Earl of Winchelsea and Sir J. Rous ought to contribute in equal shares to the payment thereof, and that they do accordingly pay each 1294*l.* 11*s.* 6¼*d.*, and on payment the Attorney-General to acknowledge satisfaction on the record of the judgment against the plaintiff, and the two bonds entered into by the Earl of Winchelsea and Sir J. Rous to be delivered up.

This being a case which the court considered as not favorable to Sir E. Deering, and a case of difficulty, they did not think fit to give him costs.

*and proceeding for debt a. to the party who is to be a bond
from the party. The party out is with on the warrant,
TOUSSAINT AND OTHERS v. MARTINNANT.
came bankrupt & they followed on the goods in the
of interest.*
IN THE KING'S BENCH, NOVEMBER 16, 1787.

[Reported in 2 Term Reports, 100.]

*Off might perhaps in equity have recovered on these
contracts but his proper
course is a
Court of law
as to sue
on the bond
do so.*
CASE for money paid, laid out, and expended, money lent and advanced, money had and received, and upon account stated. Pleas, first, *Non assumpsit*; secondly, That the defendant became a bankrupt on the 11th February, 1785, and that the causes of action accrued to the plaintiffs before. At the trial at the last Westminster sittings, before BULLER, J., the jury found a verdict for the plaintiffs, damages 1200*l.*, subject to the opinion of the court on the following case:—

The defendant having borrowed several sums of money, amounting to 1500*l.*, from different persons, prevailed on the plaintiffs, on the 8th of November, 1783, to execute jointly with him several bonds of this date to the persons advancing the money, and thereby to become jointly and severally bound with him for the payment of the principal and interest by instalments, the first of which was to become due on the 8th of March, 1786. The defendant by bond of the same date, 8th November, 1783,

¹ Show. Parl. Cas. 19 Moor, 297.

became bound to the plaintiffs in 3000*l.*, with a condition for the payment of 1500*l.*, with interest on the 8th of February, 1784, and gave them a warrant of attorney to enter up judgment thereupon; which bond and warrant of attorney were given by the defendant to the plaintiffs to secure to them the payment of the 1500*l.* and interest, for which they had so become engaged as aforesaid. On the 13th of August, 1784, the plaintiffs signed judgment against the defendant for 3000*l.* debt and 63*l.* costs, by virtue of the said warrant; and on the 29th of November, 1784, sued out a writ of *fi. fa.* returnable on the 24th day of January, 1785, upon which the goods of the defendant to the amount of 1050*l.* were taken. On the 2d of December, 1784, a commission of bankrupt issued against the defendant, and he was thereupon declared to have committed an act of bankruptcy. On the 31st of May, 1785, the defendant obtained his certificate. Soon after the issuing of this commission, the assignees claimed the effects taken under the execution; and the sheriffs, indemnified by them, delivered to them the goods, and returned *nulla bona* to the said writ of *fi. fa.* The obligees in the instalment bonds proved the sums due on their several bonds under the commission against the defendant, and received a dividend of 5*s.* 6*d.* in the pound in respect thereof; and the rest of the principal and interest, secured by these bonds, amounting to 1200*l.* 4*s.* 7*d.*, and for which this action was brought, has been paid by the plaintiffs since the date of the defendant's certificate to the said obligees, who thereupon by deed assigned over to them the subsequent dividends. If the court shall be of opinion that the plaintiffs ought not to recover, then a nonsuit to be entered.

Haywood contended, first, that if the bond and judgment had not been given, the plaintiffs would have been entitled to recover on the general ground; and secondly, that the bond and judgment could not affect the plaintiffs' right, or make any difference in the question. As to the first, laying the bond and judgment out of the question, this is like the common case where a surety, having executed a bond jointly with the principal for money to be paid at distant instalments, which become due after the bankruptcy of the principal, pays the money and then brings his action for money paid against the bankrupt. The debt from the bankrupt to the surety accrues only upon the payment of money for which he is bound; he is not damnified till after the bankruptcy, and till damnification he has no cause of action. And even where the bond in which the surety has joined has been forfeited before bankruptcy, by which a debt in law arises, and where it is perfectly clear that the surety must ultimately pay the debt, no action lies till the money is actually paid. *Taylor v. Mills and Another*,² and *Paul v. Jones*.³ So here there was no debt due to the plaintiffs till they had been called upon for payment of the money; and that not being till after the bankruptcy, there was no subsisting debt which could be

² Cowp. 525.

³ 1 T. R. 599.

proved under the commission. Hence the form of this action is not on a contract executory, nor on a promise to indemnify, but on an *indebitatus assumpsit* for the money paid. If it be contended that this bond, being absolute in its form and payable at a certain day, was forfeited before the bankruptcy, and so might have been proved under the commission, it is to be observed that it is stated in the case that the bond was given "to secure the payment of 1500*l.*, etc.," and a security for payment of the money for which a surety has engaged himself, is a security to indemnify. *Heskuyson v. Woodbridge*.¹ If, then, this be a bond of indemnity, the next question is, whether it could be proved under the commission. But the plaintiffs could not then swear to any debt being really due and owing; for though there was, according to the strict legal acceptance of the words, a debt due, yet the bond and judgment were in fact given for payment of money by instalments which had not become due; so that they were really given to secure a sum of money which never might be owing. Neither could the commissioners permit it to be proved, because it was fraudulent as against the general creditors; it would have been an attempt to load the bankrupt's estate with a double dividend for the same debt. No consideration had been paid for it before the bankruptcy, for the consideration ought to be one by which the bankrupt's estate receives benefit. And the commissioners have a right to examine into the consideration of all notes, bonds, or judgments attempted to be proved under the commission.² The mischievous consequences of permitting such debts to be proved might be very serious. It would open a door to great fraud; for a bankrupt, by collusion with his favorite creditors, might give them a preference in securities to any amount. Suppose a bankrupt could pay 15*s.* in the pound; by this double security his surety would be entitled to 30*s.* in the pound, and the bankrupt might cheat the honest creditors of one half of his estate. By increasing the securities, this evil might be increased to any extent. On another ground this bond and judgment must be inadmissible by the commissioners; for when they came to inquire into the consideration, it would appear that whether it would ever become a debt or not was an event depending on contingencies; *non constat* that the instalments might not be paid, and the plaintiffs never called upon. Hence it could not be the subject of valuation; for the plaintiffs could not tell whether they should be damnified or not, or to what amount. This makes the great distinction between this case and that of bonds for payment of certain sums by instalments, forfeited before bankruptcy; for those, being conditioned for certain stated payments subsequent to the bankruptcy, are the subject of a valuation; but this, depending on a contingency which may never happen, cannot be valued.

If it be contended that *indebitatus assumpsit* for money paid, laid out, and expended cannot be maintained in this case, it may be answered, first,

¹ Dougl. 160, n. 55.

² 1 Atk. 71, 222.

that though this is a bond in a qualified sense, yet its operation is put an end to by the commission; and secondly, that at all events it only gave the plaintiffs a concurrent remedy. As to the first, it must be allowed that this was a debt due and owing at law before the commission, and therefore was barred by it, though it could not be proved under it for want of a consideration. Bankruptcy would be a good plea to an action on the bond; for the plaintiffs could not reply that it was given for payment of a sum of money at the day on which they should be obliged to discharge the instalment bond, because that would be to aver against the condition. The same reasoning holds as to the judgment; for if execution had been taken out, the pleadings would have come to the same issue in an *audita querela*. So that this bond and judgment could be a security only up to the time of the bankruptcy, when an act of law was interposed to destroy its effect; and that being out of the way, an assumpsit arose, as in the common case upon payment of the money. With respect to the second answer, this bond and judgment could only be a collateral security. The defendant, in order to indemnify the plaintiffs, gave a present debt as a security for one which might possibly exist at a future period; but a bond given for a future debt is no extinguishment or discharge of it.¹ In *Cotterel v. Hooke*,² where a bond and also a deed of covenant were given to secure an annuity, though the bond was forfeited before a discharge under the insolvent act of 16 Geo. 3, c. 38, the defendant was held liable to be sued upon the covenant for payments becoming due after the discharge. Here no debt arose till the plaintiffs were damnified, which was not till after the bankruptcy; and that future debt for money paid could not be deraigned by a bond made before the bankruptcy, long before the debt accrued. So that even if the bond and judgment could have been proved under the commission, the dividend could only be a discharge *pro tanto*; and the plaintiffs will be entitled to hold their verdict; for they have a right to recover the 1200*l.*, deducting the amount of that dividend.

Wood, for the defendant, was stopped by the court.

ASHMURST, J. There is no doubt but that wherever a person gives a security by way of indemnity for another, and pays the money, the law raises an assumpsit. But where he will not rely on the promise which the law will raise, but takes a bond as a security, there he has chosen his own remedy, and he cannot resort to an action of assumpsit. Therefore, in this case his only security is the bond. Possibly, if the plaintiffs had recovered upon the bond when it was forfeited, and they were not afterwards damnified by being obliged to pay the instalments, by a bill in equity they might have been compelled to refund all that money which they had received. But at law the penalty of the bond became a legal debt; and as soon as that was forfeited they became creditors of the bankrupt; and might have proved their debt under the commission. But still the bond was their

¹ 1 Leon. 154.

² Dougl. 93.

remedy; and they shall not be permitted to change their security upon a subsequent event, and resort to that indemnity which the law would have raised.

BULLER, J. In ancient times no action could be maintained at law where a surety had paid the debt of his principal; and the first case of the kind in which the plaintiff succeeded was before GOULD, J., at Dorchester, which was decided on equitable grounds. Now, why does the law raise such a promise? Because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties; in the present case the plaintiffs have taken a bond, and therefore they must have recourse to that security. It has been objected by the plaintiffs' counsel that this bond could not be proved under the commission of bankrupt; but there would have been no difficulty in that. First, it is said that there is no consideration for it; but clearly, as a question of law, there is a sufficient consideration; for the surety binds himself to pay the debt of another, who afterwards becomes a bankrupt; the consideration is therefore good in law. And it is not unreasonable; for the surety may say he will only lend his credit for three months, and if the money be not paid at that time, he will call on the principal for his indemnity. The surety is the effective and responsible man; he is the person to whom the creditor principally looks, and he is taken because the credit of the principal is doubted. There is as little foundation for the other objection, that the bond is fraudulent because it is made payable before the day on which the first instalment became due. It is not fraudulent against the estate of the bankrupt, for the bankruptcy cannot make any difference in this case. In no event could this circumstance have that effect on the bankrupt's estate which has been suggested. For in the case put, a court of equity would undoubtedly give relief. If it were attempted to prove the two bonds under the commission, a court of equity would interpose, and would not suffer more than 20s. in the pound to be paid for the same debt. I do not, indeed, say by what particular course a court of equity would give relief; one way would be to compel the creditor to make his election to which of the two securities he would resort; or where the whole sum had been proved under one of the bonds, they would compel the party in possession of the other to give it up. But with respect to the form of this action, I am clearly of opinion that it cannot be supported.

GROSE, J., declared himself of the same opinion.

Judgment of nonsuit to be entered.

Plff + Def + are sureties for B. Def. having made the warranty at the request of Plff + B. + Plff has himself a pers. bond from B. Plffs for contribution to B. there

AT NISI PRIUS, BEFORE LORD KENYON, C. J., TRINITY TERM, 1796.

[Reported in 2 Espinasse, 479.]

a person become surety at the request of a co-surety he could be called upon to contribute his share although he has rendered himself liable to the person secured.

THIS was an action of assumpsit for money paid, laid out, and expended to the use of the defendant.

Plea of *non-assumpsit*.

request of a co-surety he could

The action was brought to recover from the defendant a moiety of the sum of 23*l.* paid by Turner, the plaintiff, on account of the debt of one Evans, and arose under the following circumstances.

called upon

There being an execution in Evans's house, at the suit of Brough; to induce Brough to withdraw it and to secure the debt, Turner, the plaintiff, and Davies, the defendant, joined in a warrant of attorney to Brough; but Davies had joined in consequence of having been applied to by Turner and Brough, who required an additional security. Turner, the plaintiff, took a bill of sale from Evans for his own security, dated 20th January, 1796; and an indorsement was made on it, declaring the purpose for which it was given.

to contribute his share

although he has rendered himself liable to the person secured.

Another execution having issued against Evans, the goods were taken in execution, and Turner, the plaintiff, had paid the whole of Brough's demand, and now brought this action against the defendant for contribution of the moiety.

LORD KENYON. I have no doubt, that where two parties became joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-security for contribution: but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called upon by the person at whose request he entered into the security. This is the case here: Davies, the defendant, became security at the instance of Turner, the plaintiff, to Brough; and there is still less pretext for Turner to call on the defendant in this action, as he took the precaution to secure himself by a bill of sale. I am of opinion the defendant ought to have a verdict.

The jury found for the defendant.

Gibbs and Marryatt for the plaintiff.

Garrow and Barrow for the defendant.

COWELL, ADMINISTRATOR OF COWELL v. EDWARDS.

IN THE COMMON PLEAS, JULY 1, 1800.

[Reported in 2 Bosanquet & Puller, 268.]

INDEBITATUS ASSUMPSIT for money paid.

John Cowell, the plaintiff's intestate, having entered into a joint and several bond with seven other persons, two of whom were principals and the five others as well as himself sureties, was together with his co-sureties called upon by the obligees to pay the sum engaged for; the defendant and two of the other sureties paid each a part of that sum, but the present plaintiff's intestate paid the residue. Upon this the plaintiff, considering the defendant and one of the two sureties who had already contributed as the only solvent sureties, called upon them to pay their proportion, and now brought this action to recover from the defendant such a sum of money, as when added to what had been already paid by him would make up one-third of the whole sum paid to the obligees, deducting only what had been contributed by the fourth surety not called upon at this time.

The cause was tried before Lord ELDON, C. J., at the sittings after last Easter term, when the plaintiff obtained a verdict for a sixth of the whole sum paid, not allowing for the sum paid by the fourth surety, with liberty to move the court to enter a verdict for the whole demand.

Lens, Serjt., however, on the part of the defendant obtained a rule calling upon the plaintiff to show cause why this verdict should not be set aside altogether and a new trial be had. He took these objections; that this action could not be maintained at law by one co-surety against another; that if the action could be maintained for one-sixth of the whole sum engaged for, and which under the circumstances of the present case he insisted was all that could be recovered from the defendant, yet, that the insolvency of the two principals and of the three other co-sureties should have been proved in order to entitle the plaintiff to the present verdict.

Shepherd and *Vaughan*, Serjts., were proceeding on this day to show cause, and cited *Deering v. Lord Winchelsea*, when they were stopped by

The Court, who observed that it might now perhaps be found too late to hold that this action could not be maintained at law, though neither the insolvency of the principals or of any of the co-sureties were proved; but that at all events the plaintiff could not be entitled to recover at law more than one-sixth of the whole sum paid.

And Lord ELDON, C. J., said, that he had conversed with Lord KENYON upon the subject, who was also of opinion that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law by the defendant; though if the insolvency of all the

*fact
true.*

other parties were made out, a larger proportion might be recovered in a court of equity.

In consequence of these intimations from the court, and of an opinion thrown out by them that the matter must ultimately be carried into a court of equity, an offer was made by the defendant and acceded to by the other side, to enter a nonsuit without costs.

Nota; Lord ELDON also added a doubt of his own, Whether a distinction might not be made between holding that an action at law is maintainable in the simple case where there are but two sureties, or where the insolvency of all the sureties but two is admitted, and the insolvency of the principal is admitted, and holding it to be maintainable in a complicated case like the present, such insolvency being neither admitted nor proved, and where the defendant after a verdict against him at law may still remain liable to various suits in equity with each of his other co-sureties, and where the event of the action cannot deliver him from being liable to a multiplicity of other suits founded upon his character as a co-surety.

CRAYTHORNE v. SWINBURNE.

IN CHANCERY, BEFORE LORD ELDON, C., JULY 23, 1807.

[Reported in 14 Vesey, 160.]

Sir John & paid p. 416.

HAMERSLEY & Co., bankers, being creditors of Henry Swinburne, and calling in their money, an application was made by Sir John Swinburne, the nephew of Henry Swinburne, to the Newcastle Bank; who advanced the money upon the security of two bonds: one the joint and several bond of Henry Swinburne as principal, and Craythorne as surety, for 1200*l.*; the other by Sir John Swinburne, reciting the former bond, and the advance of the money to Henry Swinburne and Craythorne, at the request of Sir John Swinburne, with condition to be void on payment by Henry Swinburne and Craythorne, or either of them. The 1200*l.* advanced was applied accordingly in discharge of the debt to Hamersley & Co. Afterwards Henry Swinburne died abroad, insolvent; and Craythorne, having paid the whole sum, filed the bill; praying contribution by Sir John Swinburne; who insisted that he was not a co-surety with the plaintiff, but merely a collateral security to the bank in default of payment by Henry Swinburne and Craythorne; and offering evidence of his conversation with one of the partners in the bank, stating their objection to the security of Henry Swinburne and Craythorne; and requiring, as the condition of the advance, a bond from Sir John Swinburne to pay the money, in case they should not pay it.

Sir *Samuel Romilly* and Mr. *Wear* for the plaintiff.

Mr. *Richards* and Mr. *Bell* for the defendants.

July 17th. Lord Chancellor ELDON. Before the final decision of this case I wish to have the Register's Book examined to see what was done in a case that occurred in Trinity term, 1706, *Cooke v. —*.¹

Upon the relation of principal and surety some things are very clear. It has been long settled that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this court, either upon a principle of equity or upon contract, to call upon his co-surety for contribution; and I think, that right is properly enough stated as depending rather upon a principle of equity than upon contract; unless in this sense, that the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground, of implied assumpsit, that in modern times courts of law have assumed a jurisdiction upon this subject, — a jurisdiction convenient enough in a case simple and uncomplicated, but attended with great difficulty, where the sureties are numerous; especially since it has been held,² that separate actions may be brought against the different sureties for their respective quotas and proportions. It is easy to foresee the multiplicity of suits to which that leads.

But, whether this depends upon a principle of equity or is founded in contract, it is clear a person may by contract take himself out of the reach of the principle, or the implied contract. In the case of *Deering v. The Earl of Winchelsea*,³ which, I recollect, was argued with great perseverance, persons not united in the same instrument were made to contribute; and it was decided, that there is no distinction, whether they are bound in the same obligation or by several instruments. That case also established, that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction. If the relation of surety for the debtor is formed, and the fact is not that the party becomes surety for both the principal debtor and another surety, not for the principal alone, it is decided, that, whether they are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases, upon the maxim that equality is equity; the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not the court will do it for him.

When once it is admitted, as it was in that case, that a man may by contract place himself out of the reach of the principle, you must in every case consider, whether the party has done so. It was admitted in that case, that, one bond being for 10,000*l.*, and the surety having paid it, Lord

¹ 2 Freem. 97.

² *Cowell v. Edwards*, 2 B. & P. 268.

³ 2 B. & P. 270.

Winchelsea having executed a bond for 4000*l.* only, though he was a surety, yet he had by contract taken himself out of the reach of the 6000*l.*, and was liable only to the extent of 4000*l.* It must then be admitted, that, if one surety can provide that another shall have no demand against him for a moiety of the debt, he may also contract that the other shall have no demand whatsoever against him.

xx { The question then is, whether the meaning of this instrument executed by the defendant is, that he will be a co-surety; or that the surety in the former instrument was with reference to him to be considered a principal. If the real nature of the transaction is to be understood thus, that Henry Swinburne and the plaintiff entered into a bond for 1200*l.* to the Newcastle Bank, Swinburne as principal and the plaintiff as surety, and Sir John Swinburne, who had no communication, as it appears, with them, proposed to the bank that he should become a co-surety, there is an end of the question; but, if not constituting himself co-surety with the plaintiff, he proposed to the bank only that he would engage to pay them if they could not get payment from either of the others, then he has by contract withdrawn himself from the reach of the principle; and the plaintiff cannot complain, as the transaction was without his knowledge, that the defendant bound himself only to the extent he thought proper.

x { With an opinion upon this point I do not however choose to decide it without an inquiry as to that case in Freeman; which, if it was decided, is a strong case, as there could be no doubt whether the second security was to be considered a collateral security; and therefore there could be no question whether the party meant to be a co-surety, or only to give, as is contended in this instance, a collateral security.

July 23. The LORD CHANCELLOR. Before I delivered the opinion I had formed upon this, I desired to have the Register's Book examined as to the case in Freeman,¹ which occurred to me; with the view of being enabled to determine, whether it was the opinion of the Master of the Rolls of that day, or had the authority of a judgment, when such a question as this was before him. I cannot find that any such judgment appears in the Register's Book. I must therefore take it to be only a declaration of the opinion of the Master of the Rolls upon the point; a declaration undoubtedly of great weight, and deserving great attention. It is therefore my duty upon a case, in its circumstances perfectly new, to deliver my own opinion.

Statement of Sir
+ { I take the case to be this, that Henry Swinburne was the only original debtor to Hamersley & Co., who called for their money; and it therefore became necessary for him to raise the money elsewhere. Sir John Swinburne appears to have applied to the Bank at Newcastle; and according to the proposal made to those bankers, the sum of 1200*l.* was to be raised upon the credit of Henry Swinburne and the plaintiff, to be applied to discharge the debt to Hamersley & Co. In that transaction so proposed,

¹ Cooke v. —, 2 Freem. 97.

Henry Swinburne was to be the principal, and the plaintiff the surety. // ✓
 The Newcastle Bank, upon a discussion that took place between them and Sir John Swinburne, intimated their dislike to deal upon the security of Henry Swinburne, and that they were not satisfied to deal upon the security of both him and Craythorne. One bond was executed and tendered to the bank; in which Henry Swinburne as principal, and Craythorne as surety, are jointly and severally bound for the sum of 1200*l*. Another bond was executed, in consequence of some conversation between the bank, by one of the partners and Sir John Swinburne, which I think is admissible evidence. The cause may be decided without reference to that question; but as it has an effect upon my mind, it is proper that the parties should know that. The substance of that communication is, that the house did not like to trust to the security of Henry Swinburne and Craythorne; but, if Sir John Swinburne had a good opinion of the credit, that might be given, if not to Henry Swinburne, to Craythorne, and would become security to the bank that he would pay, if they did not, by entering into a bond to pay the debt, if they did not pay it, the bank would advance the money. X X

The sum of 1200*l*. was advanced accordingly; the bond executed by Sir John Swinburne reciting the former bond for money advanced to Henry Swinburne and Craythorne; and the condition is that it shall be void, if Henry Swinburne and Craythorne, or either of them, pay the money; and the banker says, he understood it to be a collateral security, by which he means a supplemental security. X X

The question is, first, whether Sir John Swinburne is under this instrument to be considered as a co-surety with Craythorne; or, whether the effect is, that Sir John Swinburne did not undertake to stand as a co-surety with Craythorne, but was surety for both; to pay only if both should make default. It must be considered as entirely clear of any objection that Craythorne could take, that Sir John Swinburne was not at liberty to deal thus; as the proposition to the bank was, that Henry Swinburne and Craythorne were to be their debtors; and Sir John Swinburne, voluntarily adding his security, cannot be bound beyond the extent to which he thought proper to bind himself. "l d. X X

It was contended for the first time in *Deering v. The Earl of Winchelsea*,¹ that there is no difference, whether the parties are bound in the same or by different instruments, provided they are co-sureties in this sense for the debt of the principal; and farther, that there is no difference, if they are bound in different sums, except that contribution could not be required beyond the sums for which they had become bound. I argued that case, and was much dissatisfied with the whole proceeding and with the judgment; but I have been since convinced that the decision was upon right principles. Lord Chief Justice EYRE in that case decided that this obligation of co-sureties is not founded in contract, but stands upon a principle

¹ 2 B. & P. 270.

of equity; and Sir *Samuel Romilly* has very ably put, what is consistent with every idea, that after that principle of equity has been universally acknowledged, then persons acting under circumstances to which it applies may properly be said to act under the head of contract, implied from the universality of that principle. Upon that ground stands the jurisdiction assumed by courts of law; a jurisdiction attended with great difficulty, where there are many sureties, though not in the simple case where there are only two, one of whom may bring his action for a moiety upon the implied undertaking. But, whether this stands upon contract or a principle of equity, it is clear that a party may take care by his engagement that he shall be bound only to a certain extent. That is proved by the case of *Swain v. Wall*,¹ where the engagement being to pay in thirds, that contract was held to take them out of the principle that would have required a moiety; and also by *Deering v. The Earl of Winchelsea*, where it was admitted that Lord Winchelsea, though liable as a surety, had by contract withdrawn himself from any liability by virtue of which he should be charged beyond 4000*l*.

If, therefore, by his contract a party may exempt himself from the liability, or that extent of liability in which without a special engagement he would be involved, it seems to follow that he may by special engagement contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a co-surety, or only if the other does not pay; that is, as surety for the surety, not as co-surety with him. As to the bond itself, it is clear upon the face of this bond, and according to its language, that the bank and Sir John Swinburne, if at liberty to do so, did consider that this sum of money was to be in advance as between Sir John Swinburne and the bank, to the other two. They have no right to complain of it, for there is no contract by Sir John Swinburne with the other two; he might limit his engagement with reference to them as he thought proper, and the bond upon the face of it makes him surety only for the principal and the other surety. But it is clear upon the parol evidence, and why is not that competent evidence? Evidence is admitted to show who is the principal, and who the surety; and, in order to determine that, to show to whom the money was advanced; and why is it not to be admitted to show to whom the money was advanced as between Sir John Swinburne and the others? But this goes farther; for the evidence is, not in contradiction to, but in support of the instrument; and whether the demand is founded upon the equity only, or upon the implied contract, why should not evidence be admitted to show that the equity ought not to be applied, and the contract ought not to be inferred?

x x I do not state that the circumstance that Sir John Swinburne entered into this security without the knowledge of Craythorne would have repelled the doctrine of contribution, as that stands upon this; that all sureties are

¹ 1 Rep. Ch. 80.

equally liable to the creditor, and it does not rest with him to determine upon whom the burthen shall be thrown exclusively; that equality is equity; and, if he will not make them contribute equally, this court will finally by arrangement secure that object. But then the question comes round, whether that is according to the contract or engagement of the surety. My opinion is wrong, if Sir John Swinburne is a co-surety. Having considered this much, and given great attention to the case in Freeman, I think he is not a co-surety; but, as between him and Craythorne, the latter is just as much a principal as Henry Swinburne. The consequence is, that the equity does not apply, — Sir John Swinburne being liable only in case the other two do not pay, and not being liable with them.

This bill therefore must be dismissed, but without costs.

DAVIES v. EVAN HUMPHREYS.

IN THE EXCHEQUER, HILARY TERM, 1840.

[Reported in 6 Meeson & Welsby, 153.]

INDEBITATUS ASSUMPSIT for money paid, and on an account stated. Pleas, 1st, *non assumpsit*; 2d, the Statute of Limitations.

At the trial before COLERIDGE, J., at the Carmarthenshire spring assizes, 1839, the following appeared to be the circumstances upon which the action was founded: Shortly before the making of the promissory note herein-after mentioned, that is to say, about the month of November, 1827, the daughter of the plaintiff married the defendant, who was the son of one John Humphreys, the defendant in the action next mentioned, and which John Humphreys was then the tenant and lessee of a farm called Coed, in the same county. The plaintiff gave his daughter on her marriage £100 and some household furniture, and John Humphreys, on the same occasion, gave up to the defendant, his son, the lease of Coed, together with the stock and implements (which were valued at £1150), on the understanding that the defendant should pay him for the same the sum of £800 (being £350 less than the actual value), in the following manner: viz., by paying down the sum of £400, and giving his undertaking for the other £400. The defendant handed over to his father the £100 which he received with his wife, and they both (Evan and John Humphreys) applied to the plaintiff to make up the other £300, which were to be paid down as above mentioned. This the plaintiff declined doing; but agreed, that on the lease of Coed being deposited with him as a security, and on their procuring the money from a relative of theirs, one John Evans of Altycadno, he would join with them as their surety in a promissory note for the amount. On the 27th of December next after the marriage, the plaintiff, the defendant, and John

Humphreys met, when one Thomas Jones, an attorney, being sent for, he drew up a promissory note, which was signed by them and witnessed by him; but he died before the trial. The following is a copy of the note and indorsements:—

£300.

On demand we do hereby jointly and severally promise to pay to Mr. John Evans, of Altycadno, or order, the sum of three hundred pounds, with lawful interest for the same. Value received. As witness our hands this 27th day of December, 1827.

(Signed)

EVAN HUMPHREYS,
Of Coed, Llandifilog.
W. DAVIES, Marnarge.
JOHN HUMPHREYS.

Witness,

THOMAS JONES,
Attorney, Caermarthen.

Indorsed.

The principal money or sum of three hundred pounds is not to be called in, or recovered, or paid up, unless six months' previous notice is given of the intention of so doing in writing.

Received one year's interest, paid to the 27th of December, 1829.

1831, December 31. Received of Mr. William Davies the sum of two hundred and eighty pounds, on account of the within note, the £300 having been originally advanced to Mr. Evan Humphreys.

Witness,

THOMAS JONES.

JOHN EVANS.

June 5, 1832. Received on account of this note £20.

JOHN EVANS.

Received 11th of July, 1832, of Mr. William Davies, 8*l.* 10*s.* of account of note and interest, which I hold of him.

JOHN EVANS.

Received also, this 29th of August, 1832, 10*l.* 10*s.*

Altycadno.

JOHN EVANS.

January 12th, 1833. Received this day of Mr. William Davies, the sum of £11, which, with the sum of £— before paid by him to me, is the balance of principal and interest on this note.

Witness,

LEWIS MORRIS, Attorney, Caermarthen.

JOHN EVANS.

No evidence was given of the payee's applying to the defendant or to John Humphreys for payment, but it was proved that he applied to the plaintiff, and that the plaintiff made the payments, the receipts for which were indorsed on the note, on the respective days stated in those receipts. It also appeared that those receipts respectively were signed by the payee, and that he died before the trial.

The amount of principal and interest due on the note was paid by the plaintiff more than six years before the commencement of the suit, with the exception of £30, which was paid within that period.

Two grounds of defence were relied upon at the trial : 1st, that the respective payments were made by the plaintiff as a gift to his son-in-law, and not as a loan ; and, 2dly, that the statute of limitations was a bar to all except the £30. The learned judge left it to the jury to say whether the transaction was a gift or a loan ; and told them that, in his opinion, the statute barred all but the sum paid within the six years ; but should they be of opinion that it was a loan, he would reserve leave to the plaintiff to move to increase the damages from £30 to £300, in case this court should be of opinion that he was wrong in point of law. The jury found for the plaintiff, damages £30. In Easter term, 1839, *Chilton* obtained a rule pursuant to the leave reserved.¹

In the action by the same plaintiff against John Humphreys, which was also an action of *indebitatus assumpsit* for money paid, and on an account stated, the pleas were the same as in the other action, viz., *non assumpsit* and the statute of limitations. In this action, however, the plaintiff, by his particulars of demand, stated that he brought his action to recover £165, being the half of £330, which he was obliged to pay as principal and interest due on a promissory note for £300, dated the 27th of December, 1827, and made by the plaintiff and defendant and one Evan Humphreys, but signed by the plaintiff and the defendant as sureties for the said Evan Humphreys ; and towards the payment of which said sum of £330, so paid by the plaintiff, the defendant, as such co-surety, was liable to contribute one moiety.

On the trial of this cause, at the same assizes, the facts of the case appeared to be the same as those detailed in the preceding case against Evan Humphreys, except that Evan Humphreys was himself called as a witness for the now defendant, and stated that the money was borrowed of Evans, of Alt-y-Cadno, at the plaintiff's request, for his daughter, and to enable the witness (her husband) to pay his father for the stock of the farm left at Coed. It was objected, on the part of the defendant, that there was no evidence to show that the plaintiff signed the note as co-surety with the defendant, as stated in the particulars of demand, except the indorsement on the note that the money was originally advanced to Evan Humphreys, and that that indorsement was inadmissible for that purpose. The learned judge overruled the objection, but gave the defendant leave to move to enter a nonsuit, should the court above be of a different opinion. The questions left by him to the jury were : 1st, Were the plaintiff and defendant co-sureties with Evan Humphreys, or was the plaintiff a principal ? and, 2dly, Was the money advanced by the plaintiff as a gift, or advanced on his credit by way of loan ? and he told them that he thought the statute of limitations

¹ This rule was discharged. The opinion of the court relating thereto has been omitted. — ED.

precluded the plaintiff from recovering more than £15, a moiety of the sum paid by him within the six years next before the commencement of the action. In answer to the first question, the jury said that they thought the plaintiff and defendant were co-sureties; and to the second, that the money was advanced as a loan only; and their verdict was accordingly taken for the plaintiff, damages £15; the learned judge giving the plaintiff leave to increase the verdict, either to £30 or £150, if the court above should be of opinion that he was entitled to recover either of those sums.

In Easter term last, *E. V. Williams* and *Chilton* obtained cross rules, the former for a nonsuit, and the latter to increase the damages to £30 or £150.

In Trinity term, cause was shown against the rule for a nonsuit by *Chilton* and *Evans* for the plaintiff.

E. V. Williams and *Nicholl*, *contra*.

In the Vacation sittings after Trinity term, cause was shown against the rule to increase the damages in both actions, by

E. V. Williams and *Nicholl* for the defendant.

Chilton and *Evans*, *contra*.

XY PARKE, B. This was an action by the plaintiff against the defendant, his co-surety on a promissory note, dated the 27th of October, 1827, for the sum of £300, with interest, to recover a moiety of the whole amount which he had paid to the payee. A rule granted in this case, as well as one which was granted in another action on the same note against the principal, was argued in the sittings after Trinity term. In the course of the last term, the court disposed of the rule in the latter action, and one of the questions in this; having reserved for further consideration the question, at what time the right of one co-surety to sue the other for contribution arises.

This right is founded not originally upon contract, but upon a principle of equity, though it is now established to be the foundation of an action, as appears by the cases of *Cowell v. Edwards*,¹ and *Craythorne v. Swinburne*;² though Lord ELDON has, and not without reason, intimated some regret that the courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What then is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burthen, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him or some one liable, before he has a right to sue for contribution at all? We are not without authority on this subject, and it is in favor of the second of these propositions. Lord ELDON, in the case of *Ex parte Gifford*,³ states, that sureties stand with regard to each other in a relation which gives rise to this right among others, that if one pays more than

¹ 2 B. & P. 269.

² 14 Ves. 164.

³ 6 Ves. 805.

his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay : and he expressly says, "that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other." And this appears to us to be very reasonable ; for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt ; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other ; and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the statute of limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable ; as it would tend to multiplicity of suits, and to a great inconvenience, if each surety might sue all the others for a ratable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other, in order to prevent multiplicity of suits ; indeed, convenience seems to require that courts of equity alone should deal with the subject ; but the right of action having been once established, it seems clear that when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing. If we adopt this rule, the result will be, that here, the whole of what the plaintiff has paid within six years will be recoverable against the defendant, as the plaintiff had paid more than his moiety in the year 1831 ; and consequently the rule must be absolute to increase the amount of the verdict from £15 to £30.

Rules accordingly.

PITT v. PURSSORD.

IN THE EXCHEQUER, MAY 29, 1841.

[Reported in 8 Meeson & Welsby, 538.]

ASSUMPSIT for money paid, and on an account stated.Plea, *non assumpsit*.

The cause was tried before the under-sheriff of Middlesex, when it appeared that the plaintiff and defendant, together with a person named Boston, had signed a joint and several promissory note for £50, payable two months after date, the plaintiff and defendant being sureties for Boston. The latter paid only a portion of the amount, and on the note becoming due, the plaintiff paid the residue, and brought this action against the defendant to recover contribution. There was no proof of any demand of payment having been made upon the plaintiff, or that an action had been brought by the holder of the note, but a paper was put in, which purported to be the declaration in an action on the note by the payee against the present plaintiff. It was objected that there was no sufficient evidence of any demand having been made, nor of any action having been brought, the production of the declaration not being the proper mode of showing that an action had been commenced. The jury, under the direction of the under-sheriff, found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

WILLES now moved accordingly. This action cannot be sustained, unless it be shown that the money was paid by the plaintiff at the express request of the defendant, or under compulsion of law for the defendant's benefit. The plaintiff should have shown, either that the holder had called upon him for payment of the amount due on the note, or that he had brought an action against him. Neither of these was shown, inasmuch as the declaration was not sufficient evidence of the action having been commenced. No man can make himself the creditor of another by voluntarily, and without his request, paying a debt for him.

PARKE, B. We cannot grant a rule in this case. All the parties were jointly and severally liable to the holders of the note; and as all were liable, one party who has paid the note may bring an action against his co-surety for contribution, without showing that he paid it by compulsion. He was not bound to delay payment of the note until an action was commenced against him. The law on this subject was fully gone into by this court, in the case of *Davies v. Humphreys*.¹

ALDERSON, B. This is not a voluntary payment, nor is it like the case where one is liable as principal and another as surety. Here the sureties

¹ 6 M. & W. 153.

are not liable in default of the principal; they are all primarily liable, and are all equally so. This was not a payment made voluntarily, but was a payment in discharge of a debt due on an instrument on which the defendant was liable.

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

written on warrant of atty as collateral security for a mortgage. Held the sureties KEMP v. FINDEN. *being jointly & severally liable*
whereupon IN THE EXCHEQUER, JANUARY 15, 1844. *on default of principal*
action for sum [Reported in 12 Meeson & Welsby, 421.] *intention as to other.*

ASSUMPSIT for money paid, and on an account stated. Plea, *non assumpsit*.

At the trial before ALDERSON, B., at the London sittings after Michaelmas term, it appeared that the plaintiff and defendant had executed, as sureties for two persons of the names of William and Charles Carter, a warrant of attorney dated 3d September, 1841, given to one Price as a collateral security for the due payment of a principal sum of £560, and interest thereon, advanced by Price to the Carters on a mortgage of the same date. Default having been made by the Carters in payment of the interest, judgment was entered up on the warrant of attorney, and execution issued thereon against the plaintiff for the amount of the principal money and interest, which, together with the costs of the execution, was paid by him; and he now brought this action to recover from the defendant, as his co-surety, one-half of the sums so paid. It was objected for the defendant, first, that an action for money paid could not be maintained by a surety against his co-surety; secondly, that, at all events, the present defendant was liable in that form of action only for one-fourth of the money paid by the plaintiff; and, thirdly, that he was not liable for any part of the costs of the execution. The learned judge reserved these points, and a verdict was taken for the plaintiff, damages 299*l.* 7*s.* 9*d.*, with liberty to the defendant to move to enter a nonsuit, or to reduce the damages.

Thesiger now moved accordingly. First, this was not money paid to the use of the defendant, but rather for the use of the principals, who were the real debtors, and primarily liable. The co-surety can be made liable only in a special action of assumpsit, founded on the implied contract of indemnity. [PARKE, B., referred to *Davies v. Humphreys*.¹] The question, whether the co-surety was liable as for money paid, was not raised in that case. No doubt the principal is, because he is the party originally liable. [ALDERSON, B. Because he authorizes the payment, and the money is paid in his discharge. Does not that equally apply to

¹ 6 M. & W. 153.

the co-surety?]¹ The contract between sureties seems to be merely an implied contract of indemnity. In *Spencer v. Parry*,¹ where a tenant, by a written agreement under which he took the premises, engaged to pay taxes which by law were due from the landlord, but made default, and the landlord, having been obliged to pay, sued him for the amount, as money paid to his use; it was held, that, as the landlord was originally liable for the taxes, and was exempted from them only by an agreement with the tenant, he should have declared specially on such agreement, and could not recover on the *indebitatus assumpsit*. [PARKE, B. — There the parties were not jointly liable. Here, the payment by the plaintiff relieved the co-surety as to one-half of the amount for which each of them was liable; therefore, as to so much, it was money paid to his use. In *Cowell v. Edwards*,² it was admitted, that the action for money paid would lie. ALDERSON, B. — The ground of the judgment in *Spencer v. Parry* is, that “the plaintiff’s payment relieved the defendant from no liability but what arose from the contract between them.” But where, two being jointly liable, one of them pays money in discharge of the debt, it is money paid to the use of the other. PARKE, B. — In the case of a guaranty, there is no implied request to pay; but where several are jointly liable, there is an implied request to each of them to pay in discharge of each of the others.] If so, the co-surety who has paid the whole debt may recover the whole from the principal, even after he has recovered half from his co-surety. In *Thomas v. Cook*,³ there was a special declaration. [PARKE, B. — There are no less than three cases in which it was taken for granted that money paid will lie against a co-surety for contribution: *Cowell v. Edwards*, *Browne v. Lee*,⁴ and *Davies v. Humphreys*. In the last case, the authorities on this subject were very fully considered by the court, and it was taken throughout to be perfectly well settled that the action for money paid was maintainable. Lord ABINGER, C. B. — The general principle is, that, if a man pays money for another, which he was liable to pay, but in which he has himself an interest, he may maintain an action for money paid. PARKE, B. — In *Craythorne v. Swinburne*,⁵ the right of a surety to call upon his co-surety for contribution is treated by Lord ELDON as depending rather upon a principle of equity than upon contract, unless in this sense, that a contract may be inferred upon the implied knowledge by all persons of that principle.]

Secondly, there were here two principals and two sureties; the two principals must be considered as liable for one half of the debt, and the sureties for the other half. The plaintiff, therefore, ought to be allowed to recover only one fourth. [Lord ABINGER, C. B. — It is just the same thing as if William and Charles Carter were one person. ALDERSON, B. —

¹ 3 A. & E. 331; 4 N. & M. 770.

² 2 Bos. & P. 268.

³ 8 B. & C. 728; 3 Man. & Ry. 444.

⁴ 6 B. & C. 689; 9 D. & R. 700.

⁵ 14 Ves. 164.

There are but two sureties. It is the same as if they were sureties for a partnership firm; surely each must contribute his moiety, and not a sum proportioned to the number of persons to whom the money was lent. PARKE, B. — Browne v. Lee is an authority to show that the plaintiff is entitled to recover one half, there being only two sureties.]

Thirdly, although the co-surety may perhaps be liable for his proportion of the costs of entering up the judgment, his liability does not extend to the costs of executing it; the plaintiff might and ought to have avoided those costs by paying the money. [PARKE, B. — They were costs incurred in a proceeding to recover a debt for which, on default of the principals, both the sureties were jointly liable; and, the plaintiff having paid the whole costs, I see no reason why the defendant should not pay his proportion.]

He then applied for a new trial, on affidavits stating that the warrant of attorney was attested by a person who, although he had been admitted an attorney, had neglected for three years to take out his certificate, and had not been re-admitted; and that the defendant did not know this fact until after the verdict; and cited *Wallace v. Brockley*¹ to show that the warrant of attorney was therefore void, and *Gripper v. Bristow*² to show that this was an objection which was not waived by lapse of time or acts of the parties. But the court refused on this ground to set aside the verdict, saying, that the defendant should have made inquiry into the matter sooner; that the plaintiff had a just claim against him for the sum recovered in this action, and that it would be very unjust now to permit the defendant to defeat that claim, by setting aside the warrant of attorney on an objection which might have been made long before.

Per Curiam,

Rule refused.

the co-surety was a D. to the price for a sum larger than the amount paid as surety. GOEPEL v. SWINDEN. He was permitted to obtain such sum as security for his undertaking as surety. Held. sure he really has pay out of his. In THE QUEEN'S BENCH, HILARY TERM, 1844. now an act, but with by bringing little [Reported in 1 Dowling & Lowndes, 888.] price - + cant call on surety for contribution.

HANCE had obtained a rule, calling upon the plaintiff to show cause why the verdict obtained in this cause should not be set aside and a new trial had. The action was *indebitatus assumpsit*, for money paid by the plaintiff to the use of the defendant, and due on an account stated. Plea, *non assumpsit*. On the trial, which took place before the sheriff of Yorkshire, it appeared that this was an action for contribution against a co-surety to a promissory note, by another co-surety who had paid a part of the amount. The promissory note was in the following form: —

¹ 5 Dowl. P. C. 695.

² 6 M. & W. 807.

£200.

SHEFFIELD, 26th March, 1839.

On demand, we jointly and severally, or any two or more of us, promise to pay Mr. Jonathan Beardshaw, or order, the sum of two hundred pounds, with lawful interest for the same, for value received, as witness our hands.

Witness,
GEORGE SMITH.

JOHN YOULE, Jun.
GEORGE KITCHING.
JAMES SPRANGER GOEPEL.
WILLIAM GRAY.
JAMES SWINDEN.

The plaintiff's particulars of demand stated that "the action was brought to recover the sum of 11*l.* 11*s.* 2*d.*, being the proportion due from the defendant to the plaintiff of the sum of 46*l.* 6*s.* 4½*d.*, paid by the plaintiff as follows: Plaintiff, defendant, one William Gray, and one George Kitching, became sureties to a promissory note for one John Youle, the younger, and plaintiff and the said William Gray were forced to pay, and did, as such sureties for the said John Youle the younger, pay the sum of 92*l.* 12*s.* 9*d.*, in equal proportions on the said note; the plaintiff therefore seeks to recover the fourth part of the said sum of 46*l.* 6*s.* 4½*d.*, from the defendant as one of the sureties." It also appeared that the following were the facts of the case. That one John Youle, the younger, in order to obtain an advance of 200*l.*, procured the plaintiff and defendant, and two other persons, to sign a promissory note for that amount, as co-sureties. That at that time, plaintiff owed Youle the sum of 92*l.* 10*s.*, and that it was agreed between them, in order to induce plaintiff to sign the note, that plaintiff should retain the said sum in his hands as a security for his liability as co-surety on the note. And that he had since paid 46*l.* 6*s.* 4½*d.* upon the promissory note. It was contended, on the part of the defendant, that as plaintiff still retained the sum of 92*l.* 10*s.* in his hands, belonging to the said Youle, in pursuance of the above-mentioned agreement, he had suffered no loss upon the promissory note, and, therefore, was not entitled to maintain the action against the defendant. The under sheriff, before whom it was tried, was however of a different opinion, and directed the jury accordingly, who returned a verdict for the plaintiff. Against this ruling of the under sheriff this motion was now made. And it was submitted, the contract between the plaintiff and the defendant was one of indemnity, and that the plaintiff was not damaged; and *Davies v. Humphreys*¹ was referred to, where the cases are collected on the subject.

Pashley showed cause.

Hance, in support of the rule.

WILLIAMS, J. This was an action of assumpsit for money paid to the use of the defendant, and on an account stated, to which the defendant has pleaded the general issue. On these pleadings, the question is, whether the

¹ 6 M. & W. 153.

plaintiff has paid money under such circumstances as to create an express, or raise an implied, assumpsit on the part of the defendant! There certainly was no express promise on the part of the defendant, nor do I think that one can be implied; for although the plaintiff did pay the money in question, he did not pay it out of his own funds, but out of the money of Youle, the principal, which he retained in his hands, and which he was entitled to apply to this purpose. The law, therefore, cannot imply an assumpsit where the plaintiff has not paid his own money, but that of another party. That being so, the defence was admissible under the general issue, and in my opinion, offered a sufficient answer to the present action. I think, therefore, that the under sheriff was wrong in the mode he left the case to the jury, and the rule for a new trial must, consequently, be made absolute.

Rule absolute.

(C). much
book.

The shares are determined according to the original contract, and the rule is reversed of the original judgment of the court.

BATARD v. HAWES.

IN THE QUEEN'S BENCH, TRINITY TERM, 1853.

[Reported in 2 Ellis & Blackburn, 287.]

DECLARATION for money paid. Pleas: 1. Except as to 72*l.* 19*s.* 6*d.*, Never indebted. 2. As to 72*l.* 19*s.* 6*d.*, payment into court. The plaintiff joined issue on the first plea, and took the money out of court on the second.

On the trial, before CROMPTON, J., at the Westminster sittings in Hilary term last, it appeared that the plaintiff, the defendant, and several other persons, were members of a provisional committee; and that an engineer of the name of Baley had been employed, in respect of the scheme, in 1847, by some of the members. Baley sued the plaintiff alone, and recovered from him 753*l.* 18*s.* 7*d.*, which was paid by plaintiff in 1850. The action was for contribution. The plaintiff's case was that the members of the provisional committee, who had originally made themselves liable to Mr. Baley, were five and no more; viz., the plaintiff, the defendant, and three persons named Schneider, Douglas (defendant in the other cause), and Hilliard, all still alive. The plaintiff commenced actions against the four persons who, according to his case, were jointly liable with him, claiming from each one-fifth of the amount which he alone had paid to Baley. Schneider, before the trial of this action, compromised the action against him by paying 100*l.* The other two actions were still pending. The defendant's case was that the original employers of Mr. Baley were more than the five persons above named. There was evidence which left it somewhat in doubt how many co-contractors there were: the jury found, and it was not disputed that on the evidence they were justified in finding, that the

original employers consisted of the plaintiff, the four persons whom he sued, and also seven other members of the provisional committee, of whom two died after the debt was contracted, but before the plaintiff's payment in 1850. On this finding, the plaintiff's counsel contended that the plaintiff was entitled to one-tenth part of the debt, as the number of persons liable at law to Baley at the time the payment was made was ten. A tenth part of the debt was 75*l.* 7*s.* 10*d.*; and, as the sum paid into court was 72*l.* 19*s.* 6*d.*, the plaintiff was on this supposition entitled to a verdict for 2*l.* 8*s.* 4*d.* The defendant's counsel contended that the plaintiff was entitled only to one-twelfth part of the debt paid, the original co-contractors being twelve; and, as one-twelfth was 62*l.* 16*s.* 6*d.*, the payment into court was, on this supposition, more than sufficient. But, supposing that the right sum was 75*l.* 7*s.* 10*d.*, as contended for by the plaintiff, the defendant's counsel contended that Schneider had, on that supposition, overpaid the plaintiff 24*l.* 12*s.* 2*d.*, and that the defendant was entitled to the benefit of one-ninth of that overpayment, or 2*l.* 14*s.* 8*d.*; which would turn the scale in his favor. The learned judge directed a verdict for the plaintiffs for 2*l.* 8*s.* 4*d.*, with leave to move to enter a verdict for the defendant on either point. He said he would amend by adding a plea of payment, if necessary to raise the last point; but the plaintiff's counsel did not require the amendment to be made.

Crowder, in the same term, obtained a rule *nisi* pursuant to the leave reserved.

Bramwell and *Prentice*, showed cause.

Crowder and *Ogle*, *contra*.

LORD CAMPBELL, C. J., in this term (May 31st), delivered the judgment of the court.

It appeared in this case that the plaintiff, the defendant, and several other persons, had jointly employed Mr. Baley, an engineer, to make plans and sections, and to do engineering work, preparatory to bringing a bill for a railway before Parliament. The plaintiff was sued by Baley for the amount of his bill, and was obliged to pay him; and he then brought the present action, to recover from the defendant his share of contribution.

The jury found, at the trial, that there were twelve persons, including the plaintiff and the defendant, who were parties to the original employment of and contract with Baley; and that two of those persons had died before the payment by the plaintiff to Baley. The defendant had paid into court an amount sufficient to cover one-twelfth of the amount of the payment to Baley, but not sufficient to cover one-tenth of that amount. And the question thus arose for our consideration, Whether the amount to be recovered by the plaintiff under the above circumstances was to be calculated according to the number of original joint contractors, or according to the number of those who were alive when the payment was made, and against whom the right of the creditor to sue at law had survived.

The point appeared to us to be one which would admit of considerable doubt: and we took time to consider our judgment.

If the right to contribution is to be considered as arising merely from the fact of payment being made, so as to relieve a party jointly liable from legal liability, we should have to look to the number of co-contractors actually liable at law at the time of making the payment which relieved them from liability. But we think that it is not merely the legal liability to the creditor at the time of the payment that we are to regard, but that we must look to the implied engagement of each, to pay his share, arising out of the joint contract when entered into. To support the action for money paid, it is necessary that there should be a request from the defendant to pay, either express or implied by law. Where one party enters into a legal liability for and at the request of another, a request to pay the money is implied by law from the fact of entering into the engagement; and, if the debt or liability is incurred entirely for a principal, the surety, being liable for him at his request, and being obliged to pay, is held at law to pay on an implied request from the principal that he will do so. In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares which each co-contractor ought to pay as between themselves; and each, in effect, takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the request of such co-contractor; and, on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it, and who is relieved from paying what, as between himself and the party who pays, he ought himself to have paid according to the original arrangement. If the original arrangement was inconsistent with the fact that each was to pay his share, no action for such contribution could be maintained. Thus, if, by arrangement between themselves, one of the joint contractors, though liable to the creditor, was not to be liable to pay any portion of the debt, it is clear that no action could be maintained against him; though, if the relief from the legal liability were alone looked to, it would follow that he was liable to contribute. So, where one surety enters into an engagement of suretyship at the request of his co-surety, it has been held that the co-surety, paying the whole, can maintain no action; *Turner v. Davies*.¹

Our opinion is in conformity with the cases in which it has been held that a co-surety is not liable at law to a greater extent than his share, with reference to the original number of sureties, notwithstanding the insolvency of one or more of the co-contractors; and also agrees with the rule laid down by Mr. Justice BAYLEY, in *Browne v. Lee*,² where he says: "I think, that at law, one of three co-sureties can only recover against any one of

¹ 2 Esp. N. P. C. 479.

² 6 B. & C. 697.

the others an aliquot proportion of the money paid, regard being had to the number of sureties."

It was urged before us, by Mr. *Bramwell*, that, if there were an implied original arrangement between the co-contractors, an action ought to be maintainable on such promise against the executors of a deceased co-contractor; and he said that there being no instance of such an action went strongly to show that there was no such original engagement. It might be said, on the other hand, that there is no instance in the books of the party who has paid recovering more than an aliquot proportion with reference to the original number of co-contractors, by reason of the death of one or more of them. But it is a more satisfactory answer, that there is very strong authority for holding that such an action will lie against executors.

In *Ashby v. Ashby*,¹ those very learned judges, Mr. Justice BAYLEY and Mr. Justice LITTLEDALE rely on such an action lying against executors as the ground of their judgments on the point directly before them. Mr. Justice BAYLEY says:² "To put a plain case, suppose two persons are jointly bound as sureties, one dies, the survivor is sued and is obliged to pay the whole debt. If the deceased had been living, the survivor might have sued him for contribution in an action for money paid, and I think he is entitled to sue the executor of the deceased for money paid to his use as executor." And Mr. Justice LITTLEDALE says:³ "Suppose that a plaintiff had become bound jointly with a testator, and after his death had paid the whole debt; I should think that an action against the executor for money paid to his use might be supported, and that the plaintiff would be entitled to judgment *de bonis testatoris*." See also 2 Williams on Executors, 1st Ed., 1088.⁴ Such an action against executors can only be supported on the ground of the existence of such an implied original engagement as we have adverted to, which, being made in the testator's time, would bind the executors; and such an engagement, if implied, would form a good legal ground for supporting the action of money paid.

We were pressed also with the *dictum* of Lord ELDON in *Craythorne v. Swinburne*,⁵ referred to by PARKE, B., in *Kemp v. Finden*,⁶ and in *Davies v. Humphreys*,⁷ as to the action of contribution being founded rather upon a principle of equity than upon contract. The expressions of Lord ELDON, however, will be found to relate rather to the origin of the implied contract than to the time at which it is to be taken to be made. He says, "and I think, that right is properly enough stated as depending rather upon a principle of equity than upon contract: unless in this sense; that, the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it

¹ 7 B. & C. 444.

² 7 B. & C. 449.

³ 7 B. & C. 451.

⁴ Vol. II. p. 1509, in 4th Edition; Part IV. Bk. II. Ch. 2, § 1.

⁵ 14 Ves. 164.

⁶ 12 M. & W. 421, 424.

⁷ 6 M. & W. 153, 163.

must be upon such a ground, of implied assumpsit, that in modern times courts of law have assumed a jurisdiction upon this subject." This passage must be taken to admit the existence of an implied contract, and does not appear to us to be inconsistent with, or to outweigh, the clear expression of the opinion of the judges in *Ashby v. Ashby*.

Several inconveniences and difficulties were pointed out on both sides, in the course of the argument, as likely to arise from the adoption of each of the rules contended for: but we think that the rule suggested by the defendant's counsel will be found much more simple, and less liable to the inconveniences pointed out, than that contended for on behalf of the plaintiff.

After entertaining considerable doubt on the subject, we have come to the conclusion that the rule most in conformity with the authorities, the principles of law, and the convenience of the case, is to look to the number of original co-contractors for the purpose of determining the aliquot part which each contributor is to pay. And, the defendant in the present case having paid into court a sum sufficient to cover the amount due in proportion to the number of the original contractors, the rule for entering the verdict for the defendant must be made absolute.

Our decision upon this point renders it unnecessary to say anything upon the question raised as to the right of the defendant to credit for the over-payment by one of the co-contractors.

Rule absolute.

REYNOLDS v. WHEELER.

IN THE COMMON PLEAS, JUNE 10, 1861.

[*Reported in 10 Common Bench Reports, New Series, 561.*]

ONE Cheeseman, a contractor at Brighton, being in want of money, applied to Reynolds, the plaintiff, to accommodate him with his acceptance for 150*l.*; and upon his consenting to do so, a bill for that amount was drawn by Cheeseman upon and accepted by Reynolds. Cheeseman's bankers declining to discount the bill without having another name to it, Wheeler, at Cheeseman's request, indorsed it. On its arriving at maturity, Cheeseman prevailed upon the holders to renew the bill; and the new bill was drawn by Reynolds upon Cheeseman, and indorsed by Wheeler. Reynolds, having been compelled to pay this second bill, brought this action against Wheeler to recover contribution, and at the trial before WIGHTMAN, J., at the last assizes for Sussex, obtained a verdict for 75*l.*; leave being reserved to the defendant to move to enter a verdict for him or a nonsuit, if the court should be of opinion that, there being no joint lia-

bility in the plaintiff and the defendant, there was no implied liability to contribution.

Borill, Q. C., in Easter term last, obtained a rule *nisi* accordingly.

Tompson Chitty now showed cause.

Borill, Q. C., in support of the rule.

ERLE, C. J. I am of opinion that this rule should be discharged. The substance of the transaction is this: Cheeseman was in want of money, and applied to Reynolds and to Wheeler to lend him their names in order to obtain it. If the money had been raised by the joint and several note or bond of the three, it could not for a moment have been contended that Reynolds, paying the whole, would not have been entitled to call upon Wheeler for contribution. The machinery adopted here was the drawing of a bill by Cheeseman upon Reynolds, and the indorsement of it by Wheeler. As between these three parties and the holders, the acceptor would be primarily liable; and on his failure to pay, recourse would be had to the drawer and the indorser. But their relation to the holder has no bearing on their relation to one another. Reynolds and Wheeler each became surety for the same debt or liability of their principal, Cheeseman. Reynolds, therefore, clearly had a right to call upon Wheeler for contribution.

WILLIAMS, J. I am of the same opinion. There was evidence from which a promise on the part of the defendant to pay to the plaintiff contribution in respect of what he might have been called upon to pay on Cheeseman's account might be implied. There is some little difficulty in understanding how a contract for contribution can be implied under such circumstances as these. PARKE, B., deals with that matter in the case of *Kemp v. Finden*,¹ where he says: "In *Craythorne v. Swinburne*² the right of a surety to call upon his co-surety for contribution is treated by Lord ELDON as depending rather upon a principle of equity than upon contract, unless in this sense, that a contract may be inferred upon the implied knowledge by all persons of that principle." That has been followed by a host of authorities, which have established the principle that where two or more are sureties for the debt of another, and one of them has been called upon to pay and has paid more than his share, he may sue his co-sureties for reimbursement, to the extent of their respective proportions. If the relation of surety subsists, he is entitled to contribution, and we are entitled to disregard the form of the instrument. The recent decisions as to suretyship show that not only in actions like the present, but also in cases where the question is whether the surety has been discharged or not, the form of the instrument may be wholly disregarded.

The rest of the court concurring,

Rule discharged.

¹ The opposite rule prevails generally in the United States. 2 Ames, Cas. B. & N. 682, n. 4. Ed. 397. cf. 24

² 12 M. & W. 421, 424.

Ex parte SNOWDON. *In re* SNOWDON.

IN THE COURT OF APPEAL, MARCH 17, 1881.

[*Reported in Law Reports, 17 Chancery Division, 44.*]

THIS was an appeal by Thomas Snowden from an adjudication of bankruptcy made against him by Mr. Registrar PEPPS, acting as Chief Judge in Bankruptcy.

On the 9th of December, 1876, Snowden, John Hall, and Robert Hall, executed a joint and several bond for £2000 in favor of the National Provincial Bank of England. The bond contained a declaration that Snowden and John Hall were respectively the sureties to the bank for the payment of any moneys which then were or might thereafter become due to the bank from Robert Hall, and there was a provision limiting the liability of the sureties to £1000 for principal moneys, in addition to interest, costs, commission, and other lawful charges. In January, 1879, the creditors of Robert Hall passed a resolution for the liquidation of his affairs by arrangement. At this time there was due from him to the bank £1000 for principal and also an arrear of interest. In September, 1879, John Hall upon the demand of the bank paid them the sum of £541 2s. 1d., which was half the amount due to them by Robert Hall. On the 7th of September, 1880, John Hall issued a debtor's summons against Snowden for £270 11s. 0½d., half of the £541 2s. 1d. Snowden committed an act of bankruptcy by not complying with the summons, and on the 23d of December, 1880, John Hall presented a bankruptcy petition against Snowden. Snowden had not been called on by the bank to pay anything upon the bond, but there was nothing to show that the bank had released him. The Registrar made an adjudication of bankruptcy. He was of opinion that, according to *Craythorne v. Swinburne*,¹ when a surety is called on by the creditor to pay any part of the debt, he has a right in equity to call upon his co-surety for contribution.

Snowden appealed.

Horton Smith, Q. C., and *E. Cooper Willis*, for the appellant.

J. E. Linklater, for the petitioning creditor.

JAMES, L. J. I think that in this case there is no sufficient petitioning creditor's debt. There is no "legal debt" and there is no "equitable debt," there is no debt so far as either law or equity is concerned sufficient for the purpose of adjudication. The right of a surety who has paid the creditor is to have contribution from his co-sureties, that is to say, all the co-sureties must bear the whole burden of the debt equally. It is

¹ 14 Ves. 160.

impossible to say, when one surety has paid a part of the debt, until the whole debt is paid in respect of which all the co-sureties are jointly liable, what the right to contribution is. It is suggested that a man might be a surety for £10,000, and upon paying the creditor £100 in respect of that liability he might file a bankruptcy petition against his co-surety in respect of that £100. There must be an actual legally ascertained debt before it can be made the ground of proceedings in bankruptcy. The co-surety cannot know what is the debt due to him by his co-surety until he knows what has been done in respect of the residue of the debt for which he is equally liable. I believe the proper course when a surety is called upon to pay a part of the whole debt for which he is liable would be to bring an action against his co-sureties to compel them to contribute to pay the debt to the creditor, just as he would be entitled to call on them for contribution if he had been sued by the creditor, asking that he should be indemnified by his co-sureties against paying the whole debt, or whatever risk he ran.

But, until the whole debt has been paid by one surety, or so much of it as to make it clear that, as between himself and his co-sureties, he has paid all that he ever can be called upon to pay, there can be no equitable debt from them to him in respect of it. There is nothing ascertained as a debt which would give him a right to proceed against his co-sureties.

BRETT, L. J. When the parties to a suretyship agreement have put into their agreement a limit beyond which they will not be liable, each of them is liable to pay to the principal creditor the whole amount for which he has made himself liable. They are only liable up to the limit agreed upon. If the debt due to the creditor does not amount to the sum for which they have made themselves liable by their bond, they are only liable to pay the amount of the debt and no more. If the debt exceeds the sum to which they have limited their liability in their own bond, their liability is only to pay the amount mentioned in their own bond. That is the limit up to which they are sureties. Upon that the first question to be determined is the amount of the liability between the original debtor and creditor. When the amount of the debt between the original creditor and debtor is ascertained, it may be that the sum which they as sureties are liable to pay is the whole of that amount, but, as between themselves (if there are only two sureties), each of them is only bound to pay a half. When does the claim of the one surety against the other for contribution arise? It is not when he has paid only his own half of the amount for which he originally became surety, but his claim arises when he has paid more than half of the whole of the debt due to the creditor. That is the doctrine which was laid down in *Davies v. Humphreys*,¹ and it was a doctrine taken from the courts of equity, and adopted by the courts of law. The doctrine laid down in *Davies v. Humphreys* has never been questioned, and it seems to be

¹ 6 M. & W. 153, 168.

absolutely in accordance with what Lord ELDON said in *Ex parte* Gifford,¹ upon the authority of which *Davies v. Humphreys* was decided. There is nothing to the contrary in the other cases which have been cited, and the doctrine of *Davies v. Humphreys* remains untouched, that a surety has no claim against his co-sureties until he has paid more than his share of the debt due to the principal creditor. This state of things has not arisen in the present case, and therefore there is no claim by the petitioning creditor against his co-surety for a liquidated sum, and consequently there is no sufficient petitioning creditor's debt.

COTTON, L. J. I am of the same opinion. What we have to decide is, whether a surety who has only paid his proportion of the debt for which he is liable, can present a bankruptcy petition against his co-surety for contribution. In my opinion he cannot. To entitle him to contribution it is necessary that he should pay more than his proportion of the sum secured by the bond by which he became surety, with a limitation as to the amount of his liability. If he has paid more than his proportion (in a case where there are two sureties, more than a moiety of the debt due), then he can call upon his co-surety for contribution, although the amount may be nothing like the amount of the debt due by the principal debtor. Here the surety has been called upon to pay half the amount due under the bond, and if he has only paid his half, I cannot see how he can require contribution from his co-surety, who is equally liable to pay the other half of the debt to the creditor. Under such circumstances I cannot see that any equity can arise against the co-surety, and in this case, in my opinion, no equity does arise against the co-surety while the creditor can still call upon him for the other half of the principal debt. None of the cases which have been cited conflict with this. In *Lawson v. Wright*,² the co-sureties had guaranteed a liability of £320, and the only sum due by the debtor at the time of payment was £100. The plaintiff claimed contribution from his co-surety, but he had paid more than his proportion of the only debt which was due to the creditor, and for which he had agreed to become surety. Therefore it was held that he could in equity claim contribution, because he had paid more than his just proportion of the debt due.

JAMES, L. J. The adjudication will be annulled, with costs allowed here and in the court below.

¹ 6 Ves. 805.

² 1 Cox, 275.

*Peoff & Drift joint wrongdoers. Both sued & united party collected
 off. See then but this action for contribution*
 492 MERRYWEATHER v. NIXAN. [CHAP. V.
*Should the contribution can by law be claimed as to
 joint wrongdoers, though this same rule does not apply
 there is a joint party as to several Offs in an action
 sit*
 MERRYWEATHER v. NIXAN.

IN THE KING'S BENCH, APRIL 13, 1799.

[Reported in 8 Term Reports, 186.]

ONE Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover for the machinery belonging to the mill; and having recovered 840*l.* he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial before Mr. Baron THOMSON at the last York assizes the plaintiff was nonsuited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrong-doers; and consequently this action upon an implied assumpsit could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending that, as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages. But

Lord KENYON, C. J., said there could be no doubt but that the nonsuit was proper; that he had never before heard of such an action having been brought where the former recovery was for a tort. That the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit. And that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.¹

Rule refused.

The case of *Philips v. Biggs*,² was mentioned by *Law*, for the defendant, as the only case to be found in the books in which the point had been raised; but it did not appear what was ultimately done upon it.

¹ In such a case one is entitled to indemnity. *Adamson v. Jarvis*, 4 Bing. 66; *Betts v. Gibbins*, 2 A. & E. 57; *Dugdale and Others v. Lovering*, L. R. 10 C. P. 196. — Ed.

² Hardr. 164.

WOOLEY v. BATTE.

AT NISI PRIUS, BEFORE PARK, J., MARCH 10, 1826.

[Reported in 2 Carrington & Payne, 417.]

ASSUMPSIT for contribution. Plea, general issue. The plaintiff and defendant were joint proprietors of a stage-coach; and damages had been recovered in an action on the case, against the former only, for an injury done to Mrs. Jeavons, a passenger, by reason of the negligence of the coachman. The plaintiff had paid the whole of the damages and costs, and brought the present action to recover half the amount from the defendant as his partner.

1/2 costs.
Lx

For the plaintiff, an examined copy of the judgment against him at the suit of the husband of Mrs. Jeavons, was put in. The declaration was in case, and stated the injury to have arisen from the negligence of the present plaintiff and his servants (in the usual form). It was also proved, that the plaintiff paid the amount of damages and costs in that action, amounting to 17*6*l., under an execution; that the plaintiff and the defendant were partners in the stage-coach; and that the plaintiff was not personally present when the accident happened.

Jervis for the defendant contended, that as the action brought against the plaintiff was an action on the case for negligence, the plaintiff and defendant were joint tort-feasors; and, therefore, one only being sued, he could not recover contribution from the other; and he cited *Merryweather v. Nixan*.¹

Campbell for the plaintiff. No doubt the case of *Merryweather v. Nixan*¹ is good law, and one tort-feasor sued alone cannot recover contribution from another, who was a joint tort-feasor with him; but here it is proved, that there was no personal fault in the plaintiff. The declaration of Jeavons against the present plaintiff might, with equal propriety, have been in assumpsit; in which case, the present plaintiff might clearly have recovered contribution; and it can hardly be contended, that the plaintiff should be deprived of his contribution by Mr. Jeavons's pleader drawing his declaration in one form instead of another.

PARK, J. I think the plaintiff is entitled to recover.

*Verdict for the plaintiff. Damages, 88*l*.*

¹ 8 T. R. 186.

which was driven by Def't in such negligent manner that one H. was injured. H. recovered judgment against Def't H. which Def't was obliged to pay. Def'ts. etc. see Def't for contribution. [CHAT. N. 11] the judgment. Def't contends that since he, Def't, joint tortfeasor Def't cannot enforce contribution. BAILEY v. BUSSING.

GEORGE F. BAILEY AND ANOTHER, EXECUTORS, v. THOMAS BUSSING.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, OCTOBER TERM, 1859.

[Reported in 28 Connecticut Reports, 455.]

ASSUMPSIT. The plaintiffs sued as executors of one Aaron Turner. In 1852, a judgment was recovered against Turner, the defendant Bussing, and one Whitlock, for an injury to a person travelling on the highway, caused by the negligent management of a public stage in the running of which the defendants were alleged to be jointly interested. The defendant, Bussing, was the driver of the stage, and the injury was caused by his negligence. Turner paid the amount of the judgment, and the present suit was brought by his executors to recover one-third of the amount so paid from Bussing. On the trial before the superior court, on the general issue closed to the court, the plaintiffs introduced the record of the judgment, with parol evidence of the character of the injury for which it was recovered and of the relation of the defendant and of Turner to it, and proved the payment of \$1300 by Turner in satisfaction of the judgment; and upon this evidence claimed the right to recover. The defendant claimed that there could be no recovery in the suit, because Turner and the defendant were both wrong-doers, between whom there could be no legal claim for contribution, and on the ground that, if the defendant was liable at all, it would be only in case and not in assumpsit. The court rendered judgment for the plaintiff, and the defendant moved for a new trial.

Dutton and Brewster, with whom was *Averill*, in support of the motion.

Hawley and Taylor, contra.

ELLSWORTH, J. This is an action of assumpsit, to compel a contribution for money paid on a judgment against three defendants, Whitlock, Aaron Turner, the plaintiffs' testator, and Bussing, the present defendant. That there was a judgment rendered by the superior court for Fairfield County at its February term in 1852, against Whitlock, Turner, and Bussing, and that Turner was compelled to pay, and did pay, on the execution, the whole amount of the judgment, or such a sum as was received in satisfaction of the judgment, is admitted or not denied. This evidence, it is said, would in law *prima facie* entitle the plaintiffs to recover one-third of the sum paid from the defendant, and that there must be such recovery unless there is something peculiar to the present case which saves it from the application of the principle ordinarily applicable to such cases.

If this judgment had been recovered on a joint contract or joint liability of any kind sounding in contract, the production of the judgment, and proof of payment by Turner of the whole sum, would of course show a good cause of action in the plaintiffs for the recovery from Bussing of one-

third the amount paid. Is there anything on this record which, when taken in connection with the evidence received in the case, distinguishes this case from the one just supposed?

The defendant insists that that judgment was rendered in an action of tort, and that in that class of cases there is to be no contribution among wrong-doers; the maxim of law being, as he claims, that among tort-feasors there is no contribution. To meet this objection, the plaintiffs offered evidence, and we think with entire propriety, to prove that, while the maxim might be true as a general rule, the case on trial belonged to a class of cases to which it had no application, for that here there was no personal wrong, not even negligence in a culpable sense, on the part of Turner, and that he had been found guilty only by implication, or legal inference from a supposed relation to Bussing, the actual wrong-doer, through whose neglect the other two defendants had been subjected by the jury.

No objection was made to the reception of the evidence, and we think none could properly have been made. The court received it, and found the fact to be as claimed by the plaintiffs, that Turner was not present, and had no participation in the negligent conduct of the driver of the stage which caused the injury to Mrs. Haight, notwithstanding that, under the particular charge of the court in that case, the jury found that Turner was, in a legal sense, implicated and liable, even though there was not any actual wrong on his part.

What then is this case? And what is the true doctrine of the law as to contribution, or, as it may be, full indemnity, where there has been no illegal act or conduct on the part of him who seeks for a contribution?

And first, let us remark, that we apprehend that there can be no objection among the parties themselves, to proof *abundè* that a joint judgment in an action on the case like the present, was for the default or neglect of one of the defendants only. This fact appears not unfrequently on the face of the record itself, as when the master is sued for the negligence of his servant, but if the form of the action does not show it, and an inquiry is necessary to prove it, we know of no rule of evidence which precludes or forbids such inquiry. Such is the constant practice in actions on contracts, whatever be the form of the declaration or judgment, and the same course must be proper in this instance. It must be a very stubborn rule of law to raise in our minds any doubt upon the subject.

The reason assigned in the books for denying contribution among trespassers is, that no right of action can be based on a violation of law, that is, where the act is known to be such or is apparently of that character. A guilty trespasser it is said cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and

he may then have an indemnity, or as the case may be a contribution, as a servant yielding obedience to the command of his master, or an agent to his principal in what appears to be right, an assistant rendering aid to a sheriff in the execution of process, or common carriers, to whom is committed and who innocently carry away property which has been stolen from the owner. Indemnity, or contribution to the full amount, is allowable here, and it can be enforced by action, if refused, whether the person seeking it has been subjected in case or assumpsit to the damages of which he complains. And since in many instances the person injured has an election to sue in case or assumpsit, it is not possible that the form of action in which the party seeking for indemnity or contribution has been subjected, should be the criterion of his right to call for it. One partner or one joint proprietor may do that which will subject all the rest in case or assumpsit, as the fact may be, but there may be a right to contribution notwithstanding, and in some cases, if indeed the present is not one of them, a full indemnity may be justly demanded from the person doing the wrong, by the other partners whom he has involved in loss by his wrongful act. The form of action then is not the criterion. We must look further. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrong-doers is not to be applied. Indeed we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the cases of master and servant, principal and agent, partners, joint operators, carriers, and the like.

One of the earliest cases where the maxim is recognized is *Merryweather v. Nixan*,¹ where the plaintiff was the active wrong-doer. Having paid the whole damage, he sought for a contribution. It was denied him, and rightly so, upon the strength of the maxim referred to. But even here, lest a wrong inference should be drawn from the decision, Lord KENYON, C. J., says: "This decision will not affect cases of indemnity where one man employed another to do an act not unlawful in itself." The earlier case of *Philips v. Biggs*,² in which this point was raised, was never decided. In *Wooley v. Batte*,³ before Justice PARKE, one stage proprietor had been sued alone in case for an injury to a passenger through the neglect of the coachman, and, having paid the damages, he brought assumpsit for a contribution, and recovered on the ground that in him there was no personal fault. In *Adamson v. Jarvis*,⁴ suit was brought for indemnity by an auctioneer against his employer, he having sold goods which did not belong to his employer, and for which he had been compelled to pay upon a judgment recovered against him by the owner, being himself innocent. The court

¹ 8 T. R. 186.² Hardres, 164.³ 2 Car. & P. 417.⁴ 4 Bing. 66.

held that he could recover. BEST, C. J., said: "From the inclination of the court in the case in *Hardres* and from the concluding part of Lord KENYON's judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. In *Betts v. Gibbins*,¹ Lord DENMAN, C. J., says: "The general rule is, that between wrong-doers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself. If they were acting *bona fide*, I cannot conceive what rule there can be to hinder the defendant from being liable for the risk." Again, speaking of *Battersey's case*,² he says that it shows that there may be an indemnity between wrong-doers, unless it appears that they have been jointly concerned in doing what the party complaining knew to be illegal. In *Story on Partnership*, § 220, the learned commentator says, speaking of the maxim that there is no contribution among wrong-doers, "but the rule is to be understood according to its true sense and meaning, which is where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the innocence and propriety of the act, and the tort is one by construction or inference of law. In the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between the constructive wrong-doers, whether partners or not." The cases are all brought together in *Chitty on Contracts*, 502, where the author most fully sustains by his own remarks the qualifications of the rule laid down by Lord DENMAN. I will here leave this topic, only repeating my remark that the maxim in question is scarcely worthy of being considered a general rule of law, for it is applicable only to a definite class of cases, and to that class the case before us does not belong.

Story on Partnership

A few words will suffice as to the remaining objection, which goes to the form of action. The defendant insists that it should have been case, and not *assumpsit*, and that the evidence adduced by the plaintiff does not support his declaration. We think this objection is not well founded, and that the plaintiff has brought the proper action. He sues for money paid, laid out, and expended, which, to say the least, it was the duty of the defendant to pay, quite as much as *Whitlock and Turner*, and it was paid in satisfaction of a judgment against the three. If *assumpsit* will not reach such a case, it must be because there are no merits in the case upon which to sustain any action, which we have endeavored to show is not the fact.

That judgment was *prima facie* evidence of a joint debt or duty against the three, and the further evidence adduced by the plaintiff did not vary the apparently good cause of action, but was offered for the purpose of proving that *Turner* paid the whole judgment, and to show the character of the negligence for which the defendants had been subjected, and whose

¹ 2 A. & E. 57.

² Winch, 48.

negligence it was in fact that had thus involved him in such a heavy loss. The payment by Turner was not a voluntary payment, nor was it made officiously, nor on a mere moral obligation. Had it been, possibly the defendant here could avoid any contribution. But it was an act of necessity.

Mr. and Mrs. Haight demanded the whole judgment of Turner, and he paid it on the execution. Such a payment I must think stands on the same ground, if my reasoning hitherto is correct, as if it had been made on a judgment founded on a joint contract. In equity and justice it is money paid for the person who, in the end, is bound to pay the debt, or so much of it as belongs to him to pay. Why then should the plaintiff sue in case rather than assumpsit?

Let us look at some of the cases of assumpsit for money paid, and the principle settled by them. Generally, it is sufficient if the money is paid for a reasonable cause and not officiously. *Brown v. Hodgson*; ¹ *Skillin v. Merrill*; ² *Jefferys v. Gurr*; ³ *Pownal v. Ferrand*; ⁴ *Exall v. Partridge*; ⁵ *Toussaint v. Martinant*.⁶ So where it has been paid to relieve a neighbor's goods from legal dstraint in his absence, *Jenkins v. Tucker*,⁷ for there was a legal duty resting on the defendant. So to defray the expenses of his wife's funeral, for there was a like duty. So to reimburse the expenses of bail for pursuing the principal and bringing him back and surrendering him in court. *Fisher v. Fallows*.⁸ So for getting the defendant's goods free, which had been distrained by the landlord for the plaintiff's debt, they being at the time on the tenant's premises. *Exall v. Partridge*.⁵ Or for money paid to indemnify the owner for the loss of his goods, which the plaintiff, an auctioneer, had by mistake delivered to the defendant, who had appropriated them to his own use; *Brown v. Hodgson*; ¹ though of this case Lord ELLENBOROUGH, in *Sills v. Laing*,⁹ said that he thought the action should have been special, but the right of action he did not question. So where money has been paid by a surety, or by one of several joint debtors.¹⁰ So where one has accepted for honor a protested bill and paid it. In *Pownal v. Ferrand*,¹¹ TEXTERDEN, C. J., says: "The plaintiff is entitled to recover in assumpsit upon the general principle that one man who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter;" and Lord LOUGHBOROUGH, in *Jenkins v. Tucker*,¹² remarked that there are many cases of the sort (the funeral expenses of another's wife in his absence), where a person having paid money which another was under a legal obligation to pay, though without his knowledge or consent, may maintain an action to recover back the money so paid. The views of Chitty, in his treatise on Contracts, p. 469, and of Greenleaf, in his treatise on Evidence, vol. 2, sec. 108, are in harmony with

¹ 4 Taunt. 189.

⁴ 6 B. & C. 439.

⁷ 1 H. Bl. 90.

¹⁰ 1 Steph. N. P. 324, 326.

² 16 Mass. 40.

⁵ 8 T. R. 308.

⁸ 5 Esp. 171.

¹¹ 6 B. & C. 439.

³ 2 B. & Ad. 833.

⁶ 2 T. R. 100.

⁹ 4 Campb. 81.

¹² 1 H. Bl. 90.

this principle, that where the plaintiff shows that, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, he has paid money, not officiously, which the defendant ought to have paid, a count in assumpsit for money paid will be supported.

These cases are most abundant to show that the present action is well brought and should be sustained, if the payment made by Turner was not, as it certainly was not, an unnecessary or officious payment. We conclude therefore that the objections we have been considering ought not to defeat the right of the plaintiff to recover, and we do not advise a new trial.

In this opinion the other judges concurred.

New trial not advised.

Diff were two adjoining counties & were jointly bound to keep their bridge in repair. Their commissioners inspected the bridge, were made jointly paid for. Shortly afterwards one of the injured ARMSTRONG COUNTY v. CLARION COUNTY. by the failure of the bridge, and recovered against the Plff for his injuries. Plff paid & this action for contribution. Ground that there is no authority of Mary washer v. Siple & Sings. Plffs should not be liable.

IN THE SUPREME COURT OF PENNSYLVANIA, OCTOBER 21, 1870.
[Reported in 66 Pennsylvania State Reports, 218.]
OCTOBER 21st, 1870. Before THOMPSON, C. J., READ, AGNEW, SHARSWOOD, and WILLIAMS, JJ.

Error to the Court of Common Pleas of Clarion County: No. 88, to October and November term, 1870.

This was an action of assumpsit by The County of Armstrong against The County of Clarion, commenced October 30, 1869, for contribution under the following circumstances:—

At Rockport Mills there is a public bridge over Red Bank creek, which is the dividing line between Armstrong County and Clarion County, the bridge is consequently to be maintained at the joint expense of the two counties. In 1860 the commissioners of both counties received notice that the bridge was out of repair; they made a joint examination of it, and directed some slight repairs, which were done at the joint expense of the two counties. Not long afterwards the bridge broke down whilst John A. Humphrey was crossing with a two-horse wagon, and severely injured him. To March term 1862, he brought an action for negligence against the county of Armstrong. The commissioners of that county gave notice of the bringing of the suit to the commissioners of Clarion, and called on them to assist in its defence, which was not done. A verdict was recovered December 16, 1868, against Armstrong for \$1,100, which, with the costs amounting in all to \$1,597.31, Armstrong County paid. The commissioners of Clarion were called on to contribute their proportion to this payment, which they declined to do.

On the trial before CAMPBELL, P. J., these facts were proved or admitted, when the court, on motion of the defendant, directed a nonsuit on the

ground that there was no contribution between wrong-doers. This was assigned for error by the plaintiffs, on the removal of the case to the Supreme Court.

E. Mechling, G. W. Lathey, and D. Barclay for plaintiff in error.

W. L. Corbett for defendant in error.

The opinion of the court was delivered, January 3, 1870, by

READ, J. The bridge across Red Bank creek, between the counties of Armstrong and Clarion, at the place known as the Rockport Mills, was a county bridge, maintained and kept in repair at the joint and equal charge of both counties. Whilst John A. Humphreys was crossing the bridge it fell and he was severely injured; he brought suit for damages against the county of Armstrong; and on the trial, under the charge of the court, there was a verdict for defendant. This was reversed on writ of error;¹ and upon a second trial there was a verdict for the plaintiff for \$1,100 damages, on which judgment was entered. This judgment, with interest and costs, was paid by Armstrong County, and the present suit is to recover contribution from Clarion County. On the trial the learned judge nonsuited the plaintiff on the ground that one of two joint wrong-doers cannot have contribution from the other.

The commissioners of the two counties had examined the bridge in the summer and ordered some repairs, which were made. There can be little doubt that morally Clarion County was bound to pay one-half of the sum recovered from and paid by Armstrong County; and the question is, does not the law make the moral obligation a legal one? Merryweather v. Nixan,² the leading case on the subject, was of a joint injury to real estate, and for the joint conversion of personal property, being machinery in a mill. In Colburn v. Patmore,³ the proprietor of a newspaper, who, for a libel published in it, was subjected to a criminal information, convicted and fined, sought to recover from his editor who was the author of the libel, the expenses which he had incurred by his misfeasance; Lord LYNDHURST said: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime."

So in Arnold v. Clifford,⁴ it was held, a promise to indemnify the publisher of a libel is void. "No one," said Judge STORY, "ever imagined that a promise to pay for the poisoning of another was capable of being enforced in a court of justice."

In Miller v. Fenton,⁵ the wrong-doers were two of the officers of a bank, who had fraudulently abstracted its funds, and of course there could be no contribution between criminals. In the case of The Attorney-General v. Wilson,⁶ cited in the above case by the chancellor, and also reported in

¹ 6 P. F. Smith, 204.

² 8 T. R. 186.

³ 1 Cr. M. & R. 73.

⁴ 2 Sumner, 238.

⁵ 11 Paige, 18.

⁶ 4 Jurist, 1174.

1 Craig & Phillips, 1, where it was contended that all the persons charged with the breach of trust should be made parties, Lord COTTENHAM said: "In cases of this kind where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all parties who may more or less have joined in the act complained of." *Seddon v. Connell*,¹ is to the same effect.

In Story on Partnership, § 220, after speaking of the general rule that there is no contribution between joint wrong-doers, the author says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction, or inference of law. In the latter case, although not in the former, there may be and properly is a contribution allowed by law for such payments and expenses between constructive wrong-doers, whether partners or not." The case of *Adamson v. Jarvis*, cited by the learned commentators, is in 4 Bing. 66, in which Lord Chief Justice BEST, after noticing *Merryweather v. Nixan*, says: "The case of *Philips v. Biggs*"² (which was on the equity side of the Exchequer), "was never decided; but the court of chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.

*Story's exception
rule as to contrib-
ut. joint wrong-doers*

"From the inclination of the court in this last case, and from the concluding part of Lord KENYON's judgment in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act."

In *Betts v. Gibbins*,³ Lord DENMAN said: "The case of *Merryweather v. Nixan*,⁴ seems to me to have been strained beyond what the decision will bear—the present case is an exception to the general rule. The general rule is, that between wrong-doers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself, and *Merryweather v. Nixan*⁵ was only a refusal of a rule *nisi*."

"In *Adamson v. Jarvis*,⁶ we have the observations of a learned person familiar with commercial law."

A promise to indemnify against an act not known to the promisee at the time to be unlawful is valid. *Coventry v. Barton*; ⁷ *Stone v. Hooker*.⁸

¹ 10 Sim. 81.² Hardres, 164.³ 2 A. & E. 57.⁴ 8 T. R. 186.⁵ 8 T. R. 186.⁶ 4 Bing. 66.⁷ 17 Johns. 142.⁸ 9 Cow. 154.

In *Pearson v. Skelton*,¹ where one stage-coach proprietor had been sued for the negligence of a driver, and damages had been recovered against him, which he had paid, and he sought contribution from another of the proprietors, it was held that the rule there, no contribution between joint tort-feasors, does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act.

The same doctrine was maintained in *Wooley v. Batte*.²

These cases have been followed in this court in *Horbach's Administrators v. Elder*.³ "Here," said Judge COULTER, "the plaintiff and defendant are in *equali jure*. The plaintiff has exclusively borne the burden which ought to have been shared by the defendant, who therefore ought to contribute his share."

"Contribution," says Lord Chief Baron EYRE, in *Deering v. Earl of Winchelsea*,⁴ "is bottomed and fixed on general principles of natural justice, and does not spring from contract."

These principles rule the case before us. The parties plaintiff and defendant are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair, which is done. They erred in judgment, and both were liable for the consequences of that error, and one having paid the whole of the damages is entitled to contribution from the other.

Judgment reversed, and venire de novo awarded.

Plffs were lessees & occupants of a building in front of which door. This was negligently left open by one of plffs servants M. falling into the cellar. Plffs were compelled to pay damages. Plffs now sue for contribution.

WILLIAM W. CHURCHILL AND OTHERS v. REUBEN L. HOLT

AND OTHERS.

Held: That plffs left hatchway in reasonably safe condition. That plffs without plffs knowledge should have been kept it open in guard. Plffs should have been kept it open in guard.

[Reported in 127 Massachusetts Reports, 165.] Knowledge of Morton, J. The plaintiffs were the lessees and occupants of a building on Winter Street, a crowded thoroughfare in the city of Boston. Connected with the building there was a hatchway in the sidewalk, leading into the basement. On March 31, 1875, one Julia Meston, a traveller upon the street, fell into the hatchway, which had been left open and unguarded, and was injured. She brought an action against these plaintiffs, alleging that she was injured by reason of their negligence in keeping the covering of the hatchway in an insecure condition, in allowing it to decay and be-

¹ 1 M. & W. 504.

² 2 C. & P. 117.

³ 6 Harris, 33.

⁴ 1 Cox, 318.

come ruinous, and in allowing the hatchway to be uncovered, in which action she recovered a judgment for damages. The plaintiffs have brought this action to recover the amount of such judgment paid by them, on the ground that the hatchway was left uncovered, thus rendering the street dangerous, by the negligent and wrongful act of a servant of the defendants.

One ground taken by the defendants in this action is, that the injury was caused by the joint negligence of the plaintiffs and defendants, that they were joint tort-feasors, and, therefore, that there is no right to indemnity or contribution between them. This subject was considered in the recent case of *Gray v. Boston Gas Light Co.*,¹ and the decision in that case covers the questions raised in the case at bar. As there stated, the rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity or contribution, does not apply to a case where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability; in such case, the parties are not *in pari delicto* as to each other, though as to third persons either may be held liable. In the case at bar, it was not negligent or wrongful for the plaintiffs to have a suitable hatchway extending into the sidewalk, or to open it at proper times, taking care to provide barriers or other warnings to prevent danger to travellers on the street. The negligence which made them liable to the person injured was, that they allowed the hatchway to remain open without proper barriers or other warning. As lessees and occupants of the building, it was their duty, as between themselves and the public, to keep the hatchway in such proper and safe condition that travellers on the street would not be injured. If they neglected this duty, they would be liable, although the unsafe condition was caused by a stranger, and although they did not know it. Their liability depended upon the question whether the hatchway was dangerous to travellers under such circumstances that the occupant of the building was responsible for the injury suffered, and not upon the question as to who negligently did the act which created the danger. If the defendants, or a servant in the prosecution of their business, negligently uncovered the hatchway and allowed it to remain unguarded, without the knowledge of the plaintiffs, whereby the plaintiffs from their relation to the building were made liable to the person injured, the rule as to joint tort-feasors does not apply, but the plaintiffs can maintain this action.

The ground taken by the defendants, that the judgment in the suit by Meston against the plaintiffs is conclusive against the right to maintain this action, cannot be sustained.

Under the pleadings in that suit, the judgment may have been rendered upon the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit,

¹ 114 Mass. 149.

removed the cover, or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *participes criminis* with the defendants, and is not inconsistent with their right to maintain this action.

At the trial, the plaintiffs offered evidence tending to show that, on the day when the accident happened, they left the hatchway in a reasonably safe condition; that a servant of the defendants in the course of their business, without the knowledge of the plaintiffs, removed the cover, and left without replacing it or providing any barrier or warning; and that, while it was thus open, Mrs. Meston fell in and was injured.

We are of opinion that the evidence should have been submitted to the jury. *Case to stand for trial.*

C. R. Train and J. O. Teele, for the plaintiffs.

A. A. Ranney, for the defendants.

SECTION III.

UNDER DURESS, LEGAL OR EQUITABLE.

TOMKINS v. BERNET.

AT NISI PRIUS, IN LONDON, BEFORE TREBY, C. J., HILARY TERM, 1693.

[*Reported in 1 Salkeld, 22.1*]

THREE were bound in an usurious obligation; one of them paid some part of the money, and afterwards the obligee brought debt against another

¹ This case is reported in *Skinner*, 411, as follows:—

“Upon a trial at Guildhall in an *indebitatus assumpsit* for money received to the use of the plaintiff, the case was, the plaintiff was co-obligor with J. S. to the defendant, and between J. S. and the defendant there was an usurious contract. The plaintiff paid part of the money to the obligee, and after pleaded the statute of usury upon this bond, and this is adjudged an usurious bond; upon which he brought this action for the money paid before the bond was proven usurious. And the question was, if the action lay; and HOLT, C. J., seemed to incline strongly that it did not lie. For here there was a payment actually made by the plaintiff to the defendant in satisfaction of this usurious contract. And if they will make such contracts, they ought to be punished; and he was not for encouraging such kinds of *indebitatus assumpsits*. And though the case was objected that if a man pay money upon a policy of assurance, supposing a loss where there was not any loss, that in such case this shall be money received to the use of the payer, he admitted it; because here the money was paid upon a mistake; the same law if it was upon a fraud in the receiver; but in the principal case, he was of opinion *ut supra*, and said that he would not encourage these actions; but that it is like to the case of bribes: he who receives it ought to be punished, but he who gives them ought not to be encouraged by any way to recover his money again.” — Ed.

of the obligors, who pleaded the statute of usury, and avoided the bond; and now the obligor that had paid some part of the money without cause to the obligee, brought an *indebitatus assumpsit* against him to recover back that money. TREBY, C. J., allowed that where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, it is reasonable he should have his money again; but where one knowingly pays money upon an illegal consideration, the party that receives it ought to be punished for his offence, and the party that pays it is *particeps criminis*; and there is no reason that he should have his money again, for he parted with it freely, and *volenti non fit injuria*. This case was cited: One bound in a policy of assurance, believing the ship to be lost when it was not, paid his money, and it was held he might bring an *assumpsit* for the money. One was employed as a solicitor, and had money given him to bribe the custom-house officers; and he laid out the money accordingly. *Assumpsit* was brought against the solicitor for this money, and held it lay not.

BOSANQUETT v. DASHWOOD.

IN CHANCERY, BEFORE LORD TALBOT, C., NOVEMBER 11, 1735.

[*Reported in Cases Tempore Talbot, 37.*]

THE plaintiffs being assignees under a commission of bankruptcy against the two Cottons, brought their bill against Dashwood the defendant, as executor of Sir Francis Dashwood, who had in his lifetime lent several sums to the Cottons, the bankrupts, upon bonds bearing 6*l.* per cent interest;¹ and had taken advantage of their necessitous circumstances, and compelled them to pay at the rate of 10*l.* per cent, to which they submitted, and entered into other agreements for that purpose; and so continued paying 10*l.* per cent from the year 1710 to the year 1724.

It was decreed at the Rolls that the defendant should account; and that for what had been really lent, legal interest should be computed and allowed; and what had been paid over and above legal interest should be deducted out of the principal at the time paid; and the plaintiffs to pay what should be due on the account: and if the testator had received more than was due with legal interest, that was to be refunded by the defendant, and the bonds to be delivered up.

Mr. *Solicitor-General* and Mr. *Fazakerley* for the defendant.

LORD CHANCELLOR. There is no doubt of the bonds and contracts there-in being good: but it is the subsequent agreement upon which the question arises. It is clear that more has been paid than legal interest. That appears from the several letters which have been read, and which prove an

¹ Being the then legal interest.

agreement to pay 10l. per cent, and that from Sir Francis Dashwood's receipts; but whether the plaintiffs be intitled to any relief in equity, the money being paid, and those payments agreed to be continued, by several letters from the Cottons to Sir Francis Dashwood, wherein are promises to pay off the residue, is now the question.

The only case that has been cited that seems to come up to this, is that of *Tomkins v. Bernet*; ¹ which proves only, that where the party has paid a sum upon an illegal contract, he shall not recover it upon an action brought by him. And though a court of equity will not differ from the courts of law in the exposition of statutes; yet does it often vary in the remedies given, and in the manner of applying them.

The penalties, for instance, given by this act, are not to be sued for here; nor could this court decree them. And though no *indebitatus assumpsit* will lie, in strictness of law, for recovering of money paid upon an usurious contract; yet that is no rule to this court, which will never see a creditor running away with an exorbitant interest beyond what the law allows, though the money has been paid, without relieving the party injured. The case of *Sir Thomas Meers*, heard by the Lord HARCOURT, is an authority in point, that this court will relieve in cases, which, though perhaps strictly legal, bear hard upon one party. The case was this: *Sir Thomas Meers* had in some mortgages inserted a covenant, that if the interest was not paid punctually at the day, it should from that time, and so from time to time, be turned into principal, and bear interest: upon a bill filed, the LORD CHANCELLOR relieved the mortgagors against this covenant, as unjust and oppressive. So likewise, is the case of *Broadway*, which was first heard at the Rolls, and then affirmed by the Lord KING, an express authority that in matters within the jurisdiction of this court it will relieve, though nothing appears which, strictly speaking, may be called illegal. The reason is, because all those cases carry somewhat of fraud with them. I do not mean such a fraud as is properly deceit; but such proceedings as lay a particular burden or hardship upon any man: it being the business of this court to relieve against all offences against the law of nature and reason: and if it be so in cases which, strictly speaking, may be called legal, how much more shall it be so, where the covenant or agreement is against an express law (as in this case) against the statute of usury, though the party may have submitted for a time to the terms imposed on him? — The payment of the money will not alter the case in a court of equity; for it ought not to have been paid: and the maxims of *volenti non fit injuria* will hold as well in all cases of hard bargains, against which the court relieves, as in this. It is only the corruption of the person making such bargains that is to be considered: it is that only which the statute has in view; and it is that only which intitles the party oppressed to relief. This answers the objection that was made by the defendant's counsel, of the bankrupts being

¹ 1 Salk. 22.

participes criminis; for they are oppressed, and their necessities obliged them to submit to those terms. Nor can it be said in any case of oppression, that the party oppressed is *particeps criminis*; since it is that very hardship which he labors under, and which is imposed on him by another, that makes the crime. The case of gamblers, to which this has been compared, is no way parallel; for there, both parties are criminal: and if two persons will sit down and endeavor to ruin one another, and one pays the money, if after payment he cannot recover it at law, I do not see that a court of equity has anything to do but to stand neuter; there being in that case no oppression upon one party, as there is in this. Another difficulty was made as to the refunding: but is not that a common direction in all cases where securities are sought to be redeemed, that if the party has been overpaid, he shall refund? Must he keep money that he has no right to, merely because he got it into his hands?—I do not determine how it would be, if all the securities were delivered up; this is not now before me: I only determine what is now before the court; and is the common direction in all cases where securities are sought to be redeemed.

And so affirmed the decree, &c.

SMITH v. BROMLEY.

AT THE SITTINGS AT GUILDHALL, BEFORE LORD MANSFIELD, C. J., AFTER
EASTER TERM, 1760.

[*Reported in 2 Douglas, 696.*]

ACTION for money had and received to the plaintiff's use; upon this case: The plaintiff's brother having committed an act of bankruptcy, the defendant, being his chief creditor, took out a commission against him, but, afterwards, finding no dividend likely to be made, refused to sign his certificate. But on frequent application and earnest entreaties, made by the bankrupt to one Oliver, a tradesman in town, who was an intimate friend of the defendant, who lived in Cheshire, he got Oliver to write to the defendant several times, and he at last prevailed on the defendant to send him, Oliver, a letter of attorney, empowering him to sign the certificate, which Oliver would not do, unless the bankrupt, or somebody for him, would advance 40*l.* and give a note for 20*l.* more, and which, on Oliver's signing the certificate for the defendant, the plaintiff (who was the bankrupt's sister), paid, and gave to Oliver accordingly, who thereupon gave her a receipt for the money, promising to return it if the certificate was not allowed by the CHANCELLOR. The certificate was allowed. The plaintiff afterwards brought her action against Oliver to recover back the 40*l.* from him, but, that action coming on to be tried before Lord MANSFIELD, at Guildhall, at the sittings after last Trinity term, and it then appearing

that Oliver had actually paid over, or accounted for, the 40*l.* to Bromley, and his lordship being clearly of opinion that this action would not lie against the plaintiff's own agent, who had actually applied the money to the purpose for which it was paid to him, the plaintiff was nonsuited in that action: and now she brought this action against Bromley himself; which coming on to be tried, it was proved that the money was received by Oliver, and paid over to the defendant.

It was contended for the plaintiff, that this money was paid either without consideration, or upon one that was illegal, and, in either case, was recoverable back by this action.

For the defendant, it was argued, that there was certainly a consideration for the payment of the money, to wit, the signing of the bankrupt's certificate; That, if this consideration was illegal, the plaintiff was *particeps criminis*, had paid it voluntarily and knowingly, and without any deceit; and so was within the case of *Tomkins v. Bernet*:¹ but that there was nothing illegal in it; for it was the money of a third person, and so no diminution of the bankrupt's effects, or fraud upon his creditors; in which case only, whereby the distribution becomes unequal, is there any iniquity in receiving a consideration for signing the certificate. That, if the legislature had intended that money paid upon such consideration should be considered as illegally paid, they would have made it part of the clause in 5 Geo. 2. c. 30. which makes void bonds, bills, and other securities given for this purpose, in the same manner as in the statute against gaming, — there is an express provision for the recovering back of money lost at play. That courts of justice had always construed that clause of 5 Geo. 2. c. 30, in a strict manner, as appeared by the case of *Lewis v. Chase*,² and which case, as to the merits, seemed to be less favorable for the creditor than the present: for, there, the bankrupt himself, not the third person, gave a bond for the whole debt, in consideration of a creditor's withdrawing a petition he had preferred to the Great Seal against the allowance of the bankrupt's certificate. That in the present case, if there was any guilt, the plaintiff was more guilty than the defendant, for he had received very little towards his debt, which was 1150*l.* That, if the plaintiff had become security for her brother the bankrupt, before the act of bankruptcy, the defendant might have received the money of her, without any imputation: and that, if a third person afterwards voluntarily paid what she might before have become bound for, without any hurt to the bankrupt's other creditors, there was no imputing in the creditor's taking the money, so as it did not amount to his whole debt.

But Lord MAN-FIELD was of a different opinion. He said, it was iniquitous and illegal in the defendant to take, and, therefore, it was so to detain this 40*l.* If a man makes use of what is in his own power to ex-

¹ 1 H. 5 Will. 3. c. N. P. 1060. TERRY, Chief Justice, 1 Salk. 22.

² 1 Q. B. 1. E. 1720; 1 L. Wms. 620.

tort money from one in distress, it is certainly illegal and oppressive, and, whether it was the bankrupt or his sister that paid the money, it is the same thing. The taking money for signing certificates is either an oppression on the bankrupt or his family, or a fraud on his other creditors. It was a thing wrong in itself, before any provision was made against it by statute; for, if the bankrupt has conformed to all the law requires of him, and has fairly given up his all, the creditor ought in justice to sign his certificate; but, on the other hand, if the bankrupt has been guilty of any fraud or concealment, the creditor ought not to sign for any consideration whatever. If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage, and torturing the compassion of his family; if it is the money of the bankrupt himself, it is giving one creditor his debt to the exclusion of the others, and a fraud upon them. As to the case cited from Peere Williams, that only affected the person who petitioned. There might have been sufficient of the creditors in number and value to sign without him, and he had a right to compromise it upon what terms he pleased. The petitioning, or not, was entirely in his own power, and not like the present case. It is argued, that, as the plaintiff founds her claim on an illegal act, she shall not have relief in a court of justice. But she did not apply to the defendant or his agent to sign the certificate on an improper or illegal consideration; but, as the defendant insisted upon it, she, in compassion to her brother, paid what he required. If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action: for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*.¹ But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover; and it is astonishing that the Reports do not distinguish between the violation of the one sort and the other. As to the case of Tomkins v. Bernet, it has been often

¹ The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party (Simpson v. Bloss, 7 Taunt. 246; Frivaz v. Nichols, 2 C. B. 501). — MEL-
LOR, J., in Taylor v. Chester, L. R. 4 Q. B. 309, 314.

It is argued on the plaintiff's behalf that the claim which he makes is for money had and received, traced distinctly to Thaxter's hands, and held by a contract tainted with no illegality; that the defendant in order to resist the claim is obliged to set up an illegal agreement, and rely upon it, and that this necessity is the test as to the equality of the delict. However ingenious this suggestion may be, it can hardly prevent the court from taking the whole transaction together and considering what it is in substance and effect. The application of the maxim *in pari delicto*, etc., does not depend upon any technical rule as to which party is the first to urge it upon the court in the pleadings. In practice, it is usually insisted upon by the defendant in answer to a *prima facie* case. — WELLS, J., in Sampson v. Shaw, 101 Mass. 145, 151. [Ed.]

mentioned, and I have often had occasion to look into it; but it is so loosely reported, and stuffed with such strange arguments, that it is difficult to make anything of it. One book says it was determined by Lord HOLT; another, by Lord TREBY. Certain it is, it was only a *Nisi Prius* case. I think the judgment may have been right, but the reporter, Salkeld, not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as I take it, an action to recover back what had been paid, in part of principal and legal interest upon an usurious contract; and therefore, the action would not lie, for so far as principal and legal interest went, the debtor was obliged in natural justice to pay, therefore he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus, if the whole has been paid.¹ The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and, therefore, the man, who from mere necessity pays more than the other can in justice demand, and who is called, in some books, the slave of the lender, shall be said to pay it willingly, and have no right to recover it back, and the lender shall retain; though it is in order to prevent this oppression and advantage taken of the necessity of others, that the law has made it penal for him to take! This kind of reasoning is equally applicable to the case of a bailiff who takes garnish-money from his prisoner. It is wrong for the bailiff to take it, and it is therefore wrong for the other to tempt him, and *volenti*, etc. and therefore he shall not recover it back; but this has been determined otherwise. The case of money given to a solicitor to bribe a custom-house officer, cited in that of *Tomkins v. Bernet*, is against his own agent, and, therefore, he cannot recover. But the present is the case of a transgression of a law made to prevent oppression, either on the bankrupt, or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted, and advantage taken of her situation and concern for her brother. This does not depend on general reasoning only; but there are analogous cases, as that of *Astley v. Reynolds*.² There, the plaintiff having pawned some goods with the defendant for 20*l.* he refused to deliver them up, unless the plaintiff would pay him 10*l.* The plaintiff had tendered 4*l.*, which was more than the legal interest amounted to; but, finding that he could not otherwise get his goods back, he at last paid the whole demand, and brought an action for the surplus beyond legal interest, as money had and received to his use, and recovered. It is absurd to say, that any one transgresses a law made for his own advantage, willingly. Put the case, that a man pawns another's goods; the right owner might be obliged to pay more than the value, and would have no relief, if this action will not lie. As to the case of usury, it was decided both by Lord TALBOT, and Lord HARDWICKE, in the case of

¹ *Browning v. Morris*, Cowp. 790, 792, *accord (semble)*, per Ld. MANSFIELD. — ED.

² B. R. M. 5 Geo. 2, 2 Str. 915.

Bosanquett v. Dashwood,¹ on a bill brought to compel the defendant to refund what he had received above principal and legal interest, that the surplus should be repaid. Upon the whole, I am persuaded it is necessary, for the better support and maintenance of the law, to allow this action; for no man will venture to take, if he knows he is liable to refund. Where there is no temptation to the contrary, men will always act right.

The jury, under his lordship's direction, found a verdict for the plaintiff, with 40*l.* damages.

WILLIAMS v. HEDLEY.

IN THE KING'S BENCH, MAY 2, 1807.

[*Reported in 8 East, 378.*]

AFTER this case had been argued in the last term, upon a rule granted in Michaelmas term preceding to show cause why the verdict, which had been obtained for the plaintiff at the trial before Lord ELLENBOROUGH at Guildhall, should not be set aside and a new trial had, by Sir *V. Gibbs* and *Wigley* in support of the rule, and by *Garrow*, *Murray*, and *Laves* against it; the case stood over for consideration till this term, when the opinion of the court was delivered by

Lord ELLENBOROUGH, C. J. This was an action for money had and received, brought to recover the sum of 965*l.* 0*s.* 8*d.*, as having been unduly obtained by the defendant from the plaintiff, under an agreement to compromise a *qui tam* action for penalties of usury, brought by the defendant against the plaintiff, on the ground of certain usurious transactions which had taken place between the plaintiff Williams and one Eagleton. This sum of 965*l.* 0*s.* 8*d.* was the amount of the debt which had been owing from Eagleton to Hedley and his partner; and the jury, to whom the question was left at the trial, found that the payment of this debt of Eagleton by the plaintiff to the defendant was obtained from the plaintiff under the terror of the above mentioned action of usury brought by the defendant, and then depending against him, and through the means of an agreement between the parties to compromise that action; and the plaintiff thereupon recovered a verdict against the defendant for the amount of the money he had so obtained from him. Upon the motion for a new trial two objections have been taken to the plaintiff's right to recover: the first was, that the plaintiff was *in pari delicto* with the defendant, as to the illegal compromise of the penal action, and on that account not entitled to recover. The second objection was, that as Eagleton's assignees had, after his bankruptcy, recovered this money against the defendant and his

¹ Canc. M. 8 Geo. 2, Ca. temp. Talb. 33.

partner, as money received by them for the use of the assignees, the plaintiff could not now recover the money against the defendant ;¹ the plaintiff having, as was contended on the behalf of the defendant, enabled Eagleton's assignees to recover that money from him and his partner, and thereby estopped himself now to recover it from the defendant. But as there was no evidence given at the trial of any act done on the part of Williams, the plaintiff, in order to enable the assignees to recover, or which could be considered as rendering him in any degree privy to that suit, or liable for its consequences, that objection fell to the ground for want of its necessary foundation in point of fact. The first of these two objections is therefore the only one which remains to be considered. The answers given to it on the part of the plaintiff were, first, that the plaintiff, who was defendant in the action for usury, was not prohibited by the statute 18 Eliz. c. 5, f. 4, from agreeing to this composition, and paying the money which Hedley received under it ; but that the prohibition and penalties of the statute, in this respect, solely attached upon and were confined to the informer or plaintiff in the penal action, "or other persons concerned in suing out process, making of composition, or other misdemeanor, contrary to that statute ;" and did not attach upon or extend to the defendant, the person compounded with ; in other words, that it was the object of the statute to punish and restrain the parties using such color, and availing themselves of the pretence of such offence, for the purpose of exaction, and not the party who was the object of such exaction. And such indeed, by comparing the language of the 4th sec. of this statute, by which the penalties are created, with the language of the 3d sec., by which the prohibition is declared, appears to have been the true sense and intention of the legislature. The "making composition," the "taking money reward or promise of reward for himself, or the use of another," which are made so highly penal

¹ So far as regarded this objection, the facts of the case on the motion for a new trial were stated to be these. Eagleton was indebted to several persons, and amongst others to Eamer & Co. in 965*l.* 0*s.* 8*d.* (the sum now recovered), and was arrested by them for that sum. The plaintiff Williams and Clarence his partner were bail for Eagleton in that action, and afterwards surrendered him into custody in discharge of themselves. Eagleton had disclosed to his creditors certain transactions between him and the plaintiff, which, if true, were usurious : in consequence of which a *qui tam* action was brought in the name of Hedley, the present defendant, against Williams ; pending which the compromise in question took place, by virtue of which the sum of 965*l.* 0*s.* 8*d.* was, with the consent of Hedley, paid by Clarence, for Williams, to Eamer & Co., as for Eagleton's debt and as his money ; and the proceedings in the penal action were gotten rid of by entering up judgment of nonsuit against the common informer for not proceeding to trial ; and Eagleton was discharged as from Eamer & Co's suit. Eagleton however continued in custody at the suit of other creditors ; and afterwards became bankrupt, in consequence of such imprisonment, as of a time before the payment of the money to Eamer & Co. This money the assignees recovered from Hedley the plaintiff in the *qui tam* action, as money of Eagleton's received by him to their use, and paid over by his authority to Eamer & Co. after Eagleton's bankruptcy. — *Reporter's Note.*

in the party guilty of those offences by the 4th sec. of the statute, are misdemeanors contrary to the true intent and meaning of the act, as declared in the immediately preceding sections; in which the only offence specifically prohibited is the "informers or plaintiffs compounding or agreeing with any person or persons offending or surmised to offend against any penal statute, etc."; and not "the being compounded or agreed with, as a defendant, in such information or suit." And in *Pie's case*,¹ Lord HOBART considers this statute in the same point of view; viz., "as made for the ease of the subject, and for the avoiding and preventing of vexations by informations." Assuming, however, that the defendant, the person compounded with, is not within the express prohibitions and penalties of the act, it is still contended, that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute in question, it is so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he be not therefore to be considered as strictly *in pari delicto* with the plaintiff, he is at any rate *particeps criminis*, and in that respect not entitled to recover from his co-delinquent money which he had paid him in the course and prosecution of their mutual crime. But although this rule applies (as was said by Lord MANSFIELD, in *Smith v. Bromley*²), "if the act be in itself immoral, or a violation of the general laws of public policy:" yet in the case of other laws, "which are calculated for the protection of the subject against oppression, extortion, and deceit;" Lord MANSFIELD lays down that "if such laws be violated, and the defendant take advantage of the plaintiff's condition or situation, then the plaintiff shall recover." And in the case of *Browning v. Morris*,³ Lord MANSFIELD displays and enforces this distinction; and refers to the case of *Jaques v. Golightly* in C. P. before Lord Chief Justice DE GREY, where the same principles were adopted by the Chief Justice in the determination of that case. In respect to the criminal offence of compounding, the plaintiff Williams was the person whose situation was taken advantage of by the other party to the composition; against which party the prohibitions and penalties of the statute of the 18 Eliz. are particularly levelled. It is no answer to this that Williams the plaintiff had been criminal in another matter, and towards another person, viz., Eagleton, in the usurious dealings with him; for that criminality was perfectly collateral to the offence of compounding now under consideration; and his very consciousness of those usurious dealings, and the dread of the consequences which might result therefrom, laid him more completely at the mercy of Hedley, and enabled him to effectuate the extortion which is the foundation of this action. Indeed if the objection of *particeps criminis* were allowed to hold in its full extent, none of the cases above mentioned could have been determined; nor could the party paying usurious interest

¹ Hutt. 36.² Dougl. 696, n.³ Cowp. 792.

recover back the excess beyond legal interest, as he is constantly allowed to do; and which is particularly taken notice of and urged by Lord MANSFIELD in his judgment in the case of *Browning v. Morris*. Upon the authority, therefore, of the cases above cited, as applied to the facts of the case before us; and founding ourselves upon the distinction taken and relied upon in those cases in favor of the party for whose benefit the provisions of the law which has been violated were peculiarly made, and of whose situation advantage has been unduly taken; we are of opinion that this action was, under the circumstances of this case, maintainable; and therefore that the rule for a new trial must be discharged.

SMITH v. CUFF.

IN THE KING'S BENCH, APRIL 29, 1817.

[Reported in 6 Maule & Schwyn, 160.]

ASSUMPSIT for money paid, had, and received, and on an account stated. Plea, *non assumpsit*. On the trial before Lord ELLENBOROUGH, C. J., at the London sittings after Easter term, 1816, the plaintiff was nonsuited, subject to the opinion of the court upon the following case:—

In July, 1815, the plaintiff, who was a trader, became insolvent, and at a meeting of his creditors, at which the defendant was not present, offered them a composition of 10s. in the pound. The following memorandum of agreement, bearing date the 1st of August, 1815, was accordingly entered into:—

“We, the undersigned creditors of Thomas Smith, do agree to accept a composition of 10s. in the pound on our respective debts, the same to be secured by bills of exchange for 8s. in the pound, at two months, drawn by Mr. Smith and accepted by Mr. Beckwith, and by other bills, accepted only by Smith, for 2s. in the pound, at twelve months.”

The defendant, at the time of the making of this agreement, was a creditor for 43*l.* 12*s.* 8*d.*, and as such was applied to by Messrs. Clutton, the plaintiff's attorneys, to come into the composition and sign the agreement; but at that time he refused, saying he must first see the plaintiff. On the 2d of August the defendant wrote to the plaintiff the following letter:—

“2d August, 1815.

“SIR,—Messrs. Clutton & Co. have called on me twice; not meeting, have left word will call to-morrow morning at eight o'clock. Merely apprise you shall give them the same answer; will have a commission of

bankruptcy, or payment of the whole by instalments. So, if anything fresh to say, had better let me know previous to that time.

(Signed)

“J. CUFF, JUN.”

On the 3d of August the defendant again wrote to the plaintiff, as follows:—

“3d August, 1815.

“SIR,—Messrs. Harben & Co. have presented a paper to sign for a composition, which have refused to accede to. It now only remains to take the steps stated before, as it is only waste of time to wait longer.

(Signed)

“JOS. CUFF & CO.”

“Merely write this to apprise you the state of the affairs. My debt was evidently contracted when well known to yourself of your insolvency.”

In consequence of this communication, the plaintiff agreed to give the defendant two promissory notes, one for 174*l.* 5*s.* 1*d.*, and the other for 43*l.* 11*s.* 3*d.*, to make up the full amount of his debt; which two promissory notes, one dated the 25th of July, 1815, at nine months after date, for value received, the other bearing the same date and of the like import, at thirteen months after date, were made by the plaintiff and delivered to the defendant; but there was no evidence at the trial when these notes were so made and delivered.

On the 7th of August the defendant signed the agreement of composition, and on the 11th a bill of exchange for 174*l.* 5*s.* 1*d.*, drawn by the plaintiff and accepted by Beckwith, and also a promissory note for 43*l.* 11*s.* 3*d.*, made by the plaintiff conformably to the last-mentioned agreement, respectively dated the 1st of August, 1815, were delivered to the defendant for the full amount of 10*s.* in the pound on the whole of his said debt; and he then executed a release with the other creditors. By this instrument, after reciting that Smith stood indebted to the re-lessees in the several sums set opposite to their respective names, which he was unable to satisfy, and had therefore applied to them to accept a composition of 10*s.* in the pound, to be secured by bills of exchange for 8*s.* in the pound (drawn and accepted as in the agreement mentioned), and by promissory notes for 2*s.* in the pound (drawn as in the agreement mentioned), and which they had consented to take in full satisfaction of their respective debts; the several parties to those presents, in consideration of the said bills of exchange and promissory notes being given to them respectively at or before the sealing and delivery of those presents, the receipt whereof they thereby respectively acknowledged, remised, released, and discharged Smith, his heirs, executors, and administrators of and from all and all manner of action, suit, causes of action, bills, bonds, debts, etc., claims and demands whatsoever, both at law or in equity, which against Smith each or every of them then had or thereafter might have by reason of all and every the debts to them respectively due and owing from Smith, or by

reason of any other matter, cause, or thing whatsoever, from the beginning of the world unto the day next before the day of the date of those presents (save only the aforesaid bills of exchange and promissory notes); and the said several creditors did for themselves severally, and for their respective heirs, executors, and administrators, etc., covenant, in pursuance of the terms of the release, not to bring actions, etc., against Smith. Proviso, that if Beckwith and Smith, or one of them, should not duly pay their bills for 8s. in the pound, or if Smith should not duly pay his promissory notes for 2s. in the pound, the release and covenants of the creditors whose bills or notes should not be paid should be void. Beckwith's acceptance for 8s. in the pound on the defendant's debt was duly paid. The plaintiff's note for the remaining 2s. in the pound was not due at the time of the trial. The note for 174*l.* 5*s.* 1*d.* given by the plaintiff to the defendant was, about two months before it became due, indorsed and delivered by the defendant to one Douglass, with whom he had previous dealings in trade, and who gave him his acceptance for the amount, that being more negotiable than a promissory note. About a month before it became due, the defendant wrote to the plaintiff as follows:—

“25th March, 1816.

“SIR, — Since seeing you I resolved to let the matter in question take its course, merely apprise you the parties who have got it will enforce the matter; therefore, of course you will be prepared to prevent personal inconvenience. (Signed) “Jos. CUFF & Co.”

The note was at Douglass's bankers when it became due, and was never returned to the defendant, but was put by Douglass into the hands of the defendant's attorney in the present action, he having been recommended to him by the defendant. An action was accordingly brought upon it; and the plaintiff, on the 3d of May, 1816, before the commencement of the present action, paid the full amount and interest, with costs, and the debt was immediately paid over by the attorney to Douglass. The present action is brought to recover the said sum of 174*l.* 5*s.* 1*d.*, the excess beyond the said composition of 10*s.* in the pound.

If the court should be of opinion that the plaintiff is entitled to maintain the action, a verdict to be entered for the plaintiff; if otherwise, the nonsuit to stand.

Cumyn for the plaintiff.

Campbell, contra.

LORD ELLENBOROUGH, C. J. This is not a case of *par delictum*; it is oppression on one side, and submission on the other; it never can be predicated as *par delictum* when one holds the rod and the other bows to it. There was an inequality of situation between these parties: one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce. And is there any case where, money

having been obtained extorsively, and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided that an action lies.

BAYLEY, J. The reason assigned in *Smith v. Bromley* for that decision was, that the party who insisted on payment was acting with extortion and oppressively, and in the teeth of that which he had agreed to accept. And does not this reason apply to the present case? The conduct of the defendant here is that of one taking undue advantage of the plaintiff's situation and endeavoring to extort from him by oppression that which he stipulated not to demand.

HOLROYD, J. With respect to the objection to the form of action, this is money paid to the order of the defendant; or in other words, money had and received by him through the medium of the person to whom by his order it was paid. Unless it may be recovered in this form, the law would be giving effect to a transaction which it condemns as unlawful because unjust.

Per curiam,

*Judgment for the plaintiff.*¹

GIST, ETC., v. SMITH.

IN THE COURT OF APPEALS OF KENTUCKY, IN EQUITY, MARCH 6, 1880.

[*Reported in 78 Kentucky Reports, 367.*]

D. W. Lindsey for appellant.

Carroll and Barbour for appellee.

Judge COFER delivered the opinion of the court.

THERE is some controversy in this case as to the facts, but for the purposes of this opinion we shall assume the facts to be as claimed by the appellants.

In November, 1872, W. L. Gist borrowed of Jacob S. Smith the sum of \$3748.70, and executed his note for \$3835, bearing ten per cent interest from date, and payable in one year.

Gist paid on the note, March 1, 1874, \$692.50; March 1, 1875, \$540, and in January, 1876, \$3755.20.

The note embraced \$86.30 in excess of the sum loaned, and interest was paid on the amount of the note at ten per cent per annum from the time the loan was made until the debt was discharged in full by the payment made in January, 1876.

Gist transferred to his wife his supposed right to reclaim the usury paid to Smith, and thereupon Gist and wife brought this suit.

They claim that, as the interest paid and the amount deducted from the

¹ *Horton v. Riley*, 11 M. & W. 492, *accord*. — ED.

note exceeded ten per cent on the amount loaned for the period during which the loan was continued, the whole interest was forfeited, and that they are entitled to recover back all that was paid in excess of the sum actually loaned.

The court below gave them a judgment for the excess paid over ten per cent, and not content with that, they prosecute this appeal.

The loan was made while the conventional interest law of March 14, 1871, was in force.

That act made it lawful to contract, in writing, for the payment of any rate of interest for the loan or forbearance of money not exceeding ten per cent.

But section 5 provided : " That if any rate of interest exceeding the rate authorized by the first section of this act shall be charged, the whole interest shall be forfeited ; and if the lender in such usurious contract refuse, before suit brought, a tender of the principal without interest, he may, in any suit brought on such contract or assurance, recover the principal, but shall pay the cost of such suit."

Counsel for Smith contend that the statute, although it declares that if more than ten per cent interest be contracted for the whole interest should be forfeited, does not declare the contract for interest to be void, and that the contract not being void, but only subject to forfeiture, the forfeiture may be waived, and is waived, unless it be taken advantage of in the mode pointed out in the statute, *i. e.*, by a tender of the principal before suit brought.

We cannot accept the conclusion reached as correct. To so construe the statute would be to render the provision for a forfeiture of the interest of no practical benefit.

By the express words of the statute, the tender provided for must be made before suit is commenced. Suit may be commenced on the day succeeding that on which the debt falls due, and the debtor has no right to pay before the day on which the debt falls due ; so that, in order to take advantage of the forfeiture, he must see the creditor on the very day the debt matures and tender the money. This would be often impracticable, and the debtor will so generally be unable to make the tender that we cannot suppose the legislature intended to make the right to insist upon the forfeiture depend upon a tender of the principal on the very day the debt matures.

Usury laws are made to protect the weak against the strong, and should not receive a construction which will deprive all persons of their protection, except such as may be able to meet their engagements on the day of their maturity.

Moreover, the language of the act clearly indicates that the only purpose of the provision in regard to tender was to subject the usurer who should refuse the principal, when tendered, to the cost of the suit in addition to the forfeiture of all the interest. The language is, " the whole interest

shall be forfeited ;" and if the lender, etc., refuse, before suit brought, a tender, etc., he "shall pay the cost of such suit."

Counsel next contend that a voluntary payment is a waiver of the forfeiture, and that Gist, having paid the debt and interest, cannot recover back more than the excess over ten per cent. In this we think they are right.

There is a plain distinction between a provision in a statute that a contract for interest above a certain rate shall be void as to the whole interest contracted for, and a provision that the whole interest shall be forfeited.

A forfeiture may be waived by the person in whose favor it is declared, and money paid upon a contract which the obligee might have resisted as forfeited should be presumed to have been paid, because the person paying had elected to waive the forfeiture.

But money paid upon a contract declared by statute to be void is not paid under any contract at all, it is paid without consideration, either good or valuable, and may be recovered back, unless the transaction is of such a character that the law will not aid either party, which is not the case as to one who pays usurious interest.

Wherefore, the judgment is affirmed.¹

JAMES B. HAYNES, RESPONDENT, *v.* JAMES H. RUDD, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 1, 1886.

[*Reported in 102 New York Reports, 372.*]

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made the second Tuesday of June, 1883, which affirmed a judgment in favor of plaintiff entered upon a verdict. Reported below.²

The nature of the action and the material facts are stated in the opinion.

The case is reported on a former appeal in 83 N. Y. 253.

T. W. Collins for appellant.

W. R. Mason for respondent.

MILLER, J. The plaintiff seeks to recover in this action the amount of a promissory note given by him upon the settlement of a claim by defendant, that plaintiff's son, who was in defendant's employ, had, at different times, stolen his money.

The complaint alleged that the note was given in order to compound and

¹ One paying a rate of interest that is lawful but which could not have been recovered because of a statute requiring a contract calling for more than six per cent per annum to be in writing, is not entitled to restitution. *Marvin v. Mandell*, 125 Mass. 562. — ED.

² 30 Hun, 237.

settle a supposed felony or misdemeanor, and that the said note was extorted from the plaintiff and his wife by threats of public charges against the character of their son, and that the note was executed in fear of the same. It was transferred by plaintiff before maturity to a *bona fide* holder, and plaintiff paid it.

On a former appeal to this court in this action, it was held that where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid.

In the opinion of the court by FOLGER, C. J., the rule is laid down that if there was simply a compounding of felony, both plaintiff and defendant, on an equality, agreeing that the plaintiff should give his written promise to the defendant, and that, therefore, the defendant should give his oral promise to conceal the felony and abstain from prosecuting it, and withhold the evidence of it, then they were *in pari delicto*, and the law will leave them where it finds them; and it is said that "to give the plaintiff any claim to recover, he must show that he was in such plight from the force or threats of the defendant as that he was in duress, and gave the note without being willing to, to escape from the predicament in which that force or those threats put him."

Upon the last trial, which is the subject of review on this appeal, the case appears to have been presented by the plaintiff on the theory that threats were used, and duress and undue influence exercised by the defendant upon the plaintiff and his wife, by means of which the note was obtained, independent of the question whether the note was executed for the purpose of compounding a felony, and that thus a case was established against the defendant.

The plaintiff in this action insists that the facts establish that the parties did not stand *in pari delicto*; that the defendant took undue advantage of the plaintiff and his wife, of the circumstances in which the plaintiff stood, surrounded as he was by his family; that this operated as duress and undue influence to coerce, and, as the jury found, did coerce the plaintiff's will and destroyed the equality between the parties, and induced the plaintiff to give the note in question.

In none of the cases cited by the respondent's counsel to sustain the position contended for was the precise point presented whether the parties stood *in pari delicto* when the compounding of a felony entered into and constituted part of the consideration of the contract, and they, therefore, are not decisive of the question. *Dunham v. Griswold*,¹ *Turley v. Edwards*;² *Foley v. Green*;³ *Williams v. Bayley*.⁴

¹ 22 Week. Dig. 296.

² 1 West. Rep. 450.

³ 21 Cent. L. J. 175.

⁴ 35 L. J. Ch. 717.

Whether the parties stood *in pari delicto* depends upon the fact whether the evidence proved that the note in question was given for compounding a felony. If the testimony established that such was the case, then both parties must be regarded as equally in fault, and the court will not lend its aid to either in enforcing a contract of such a character because it is illegal and void. While fraud, duress, and undue influence employed in procuring a contract for the payment of money may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist and cannot be enforced where the consideration of the contract, thus made, arises entirely upon or is in any way affected by the compounding of a felony. When this element enters into the contract, it becomes tainted with a corrupt consideration and cannot be enforced. The correctness of this rule was recognized by the trial judge in his charge to the jury. He charged, among other things, as follows: "Was the note a legal contract or an illegal contract? It was an illegal contract and void between the parties, if it was given upon an agreement to suppress the evidence of a crime alleged to have been committed, equally as if it were given upon an agreement to suppress the evidence or refrain from prosecuting a crime which had been in fact committed." He also charged, "If he impressed upon the plaintiff the idea that he would thus refrain and would conceal the crime if he would give the note, but that he would not refrain if he did not give the note, it was an illegal contract." He further charged, upon being requested, that if the note was given simply to compound a felony, the plaintiff could not recover. So far the charge of the judge was entirely correct, and the case was properly presented to the jury in this respect.

The judge, however, was requested to charge as follows: "That if the compounding of a felony entered into and formed a part of the consideration of the note, the plaintiff could not recover." And also, "that if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, he would not be entitled to recover."

Both of these requests were refused and exceptions taken to the rulings of the judge. We think there was error in each of the refusals. Within the rule already laid down, if the consideration of the note was in any way affected by the compounding of a felony, or it entered into the same, or such a motive actuated the plaintiff in any respect, then the contract was illegal, and should not be upheld. In such a case the contract was vicious and corrupt, and in violation of law as much as if compounding a felony had been the entire consideration. The element of illegality constituted a part of the contract, thus vitiating the whole, and it could not be rejected because duress, undue influence, or threats were also blended with it.

It cannot be said that these requests were covered by the charge which had already been made, for while such charge comprehended the principle

that the note might be avoided if given for compounding a felony, the refusals to charge left it to be inferred that this element might constitute a portion of the consideration without affecting its validity. This was clearly wrong, and the defendant was entitled to the charge in accordance with the requests made, and the judge erred in refusing the same.

We cannot agree with the doctrine that if the plaintiff was influenced by the duress of the defendant, and at the same time both parties intended the compounding of a felony, that they were not *in pari delicto*. It is enough that the vice of compounding a felony was a part of the contract, operating upon the minds of both parties, and thus placing them upon an equality, to render the contract nugatory and of no effect.

For the errors of the judge in refusing to charge as requested, without considering the other questions raised, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except RUGER, C. J., not voting.

Judgment reversed.

ASTLEY v. REYNOLDS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1732.

[Reported in 2 Strange, 915.]

IN an action for money had and received to the plaintiff's use, the case reserved for the consideration of the court was, that above three years ago, the plaintiff pawned plate to the defendant for 20*l.* and at the three years' end came to redeem it, and the defendant insisted to have 10*l.* for the interest of it, and the plaintiff tendered him 4*l.*, knowing 4*l.* to be more than legal interest. That the defendant refusing to take it, they parted; and at some months' distance, the plaintiff came and made a second tender of the 4*l.*, but the defendant still insisting upon 10*l.* the plaintiff paid it and had his goods, and now brings this action for the surplus beyond legal interest.

Reeve, Filmer, and Draper for plaintiff.

Marsh and Fazakerley for defendant.

Per curiam, The cases of payments by mistake or deceit are not to be disputed; but this case is neither, for the plaintiff knew what he did, in that lies the strength of the objection; but we do not think the tender of the 4*l.* will hurt him, for a man may tender too much, though a tender of too little is bad; and where a man does not know exactly what is due, he must at his peril take care to tender enough. We think also, that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied it must be where the party had

his freedom of exercising his will, which this man had not ; we must take it he paid the money relying on his legal remedy to get it back again.

The plaintiff had judgment ; and the defendant dying pending the argument, judgment was ordered to be entered *nunc pro tunc*.

LINDON v. HOOPER.

IN THE KING'S BENCH, FEBRUARY 12, 1776.

[*Reported in Cowper, 414.*]

UPON a rule to show cause why a new trial should not be granted in this case, Mr. Justice ASHHURST read his report as follows : This was an action for money had and received brought by the plaintiff against the defendant Hooper, who had distrained the plaintiff's cattle. The plaintiff insisted he had a right of common, and demanded his cattle to be restored, which the defendant refused to do, unless the plaintiff would pay him 20s. for the damage done. Upon this, the plaintiff paid the money in dispute for the release of his cattle ; and the action is brought for that money. At the trial the question was, whether the plaintiff was entitled to recover back the money so paid, by this species of action ? My opinion was, that he could not ; for it would be extremely inconvenient and hard if a defendant should upon his parole be obliged to come and defend himself against any right that a plaintiff might set up, without giving him notice ; and accordingly the plaintiff was nonsuited.

Mr. *Mansfield* showed cause.

Mr. *Morris* and Mr. *Buller*, *contra*.

LORD MANSFIELD now stated the case from the report of Mr. Justice ASHHURST, from which I collected this additional circumstance not before mentioned ; namely, that the defendant agreed to return the money if the plaintiff should make out his right ; and then his lordship proceeded to deliver the opinion of the court as follows : —

The particular circumstances of a promise or agreement to return the money, if the plaintiff should make out his right, do not distinguish this case from the general question : they relate to an amicable settlement which never took place.

The question then is general : Whether the proprietor of cattle distrained, doing damage, who has paid money to have his cattle delivered to him, can bring an action for that money as had and received to his use ?

Though, after the cause is brought before the jury, an objection to turn the plaintiff round, if the merits can be fully and fairly tried in the action brought, is unfavorable ; yet, if founded in law, it must prevail. We were extremely loath to allow it without full consideration.

The present case is singular, and depends upon a peculiar system of strict positive law.

Distraining cattle doing damage is a summary execution in the first instance. The distrainer must take care to be formally right; he must seize them in the act; upon the spot; for if they escape, or are driven out of the land, though after view, he cannot distrain them. He must observe a number of rules in relation to the impounding and manner of treating the distress.

The law has provided two precise remedies for the proprietor of cattle which happened to be impounded.

1st, He may replevy; and, if he does, upon the avowry, he must specially set out a right of common, or some other title, as a justification of the cattle being where they were taken. Or,

2dly, If he does not choose to replevy, but is desirous to have his cattle immediately re-delivered, he may make amends, and then bring an action of trespass for taking his cattle; and particularly charge the money so paid by way of amends as an aggravation of the damage occasioned by the trespass. If to such an action the distrainer pleads that he took them doing damage, the plaintiff must specially reply the right or title which he alleges the cattle had to be there.

If instead of an action of trespass, an action to recover back the money so paid by way of amends might be brought at the election of the plaintiff, the defendant would be laid under a great difficulty. He might be surprised at the trial; he could not be prepared to make his defence; he could not tell what sort of right of common or other justification the plaintiff might set up. The plaintiff might shift his prescription as often as he pleased; or he might rest upon objections to the regularity of the distress. The plaintiff can never be suffered to elect to throw such a difficulty upon his adverse party. Besides, as applied to the subject-matter of this question, the action for money had and received could never answer the equitable end for which it was invented and deserves to be encouraged. For the point to be tried and determined in this action is, Whether the plaintiff's cattle trespassed upon the defendant's land? That may depend upon the plaintiff's right, or the defendant's right, or the fact of trespassing; or it may depend upon mere form. If the distress was irregular, the amends must be recovered back again. So that, allowing the owner of the cattle to substitute this remedy in lieu of an action of trespass would, as between the parties, be unequal and unjust, and upon principles of policy would produce inconvenience. It would break in upon that branch of the common and statute law which relates to distresses. It would create inconvenience, by leaving rights of common open to repeated litigation, and by depriving posterity of the benefit of precise judgments upon record.

As to prescriptive rights of common, the money paid by way of amends is a special damage; and is always so alleged in the declaration of tres-

pass, which in every view is the action peculiarly proper for this kind of question.

An action for money had and received is a new experiment. No precedent has been cited. This objection alone would not be conclusive; but upon principles of private justice and public convenience, we think the method of proceeding used and approved for ages, in the case of distresses, ought to be adhered to.

There is a material distinction between this and the instances alluded to at the bar, where the plaintiff is allowed to waive the trespass, and bring the action for money had and received. In those instances, the relief is more favorable to the defendant. He is liable only to refund what he has actually received, contrary to conscience and equity. In this, informalities in taking or treating the distress would avoid the amends, though the defendant had a right to distrain. But, which is more material, in those instances, the plaintiff, by electing this mode of action, eases the defendant of special pleading, and takes the risk of being surprised upon himself. In this, he eases himself of the difficulty and precision of special pleading, and the burthen of proof consequent thereupon, and exposes the defendant to uncertainty and surprise.

The case of *Feltham v. Terry*, Pasch. 13 Geo. 3, B. R., relied on in the argument, was a case of goods taken in execution, and sold under a warrant of distress upon a conviction. The conviction was quashed; consequently there could be no justification. The plaintiff, by bringing his action for money had and received, could only recover the money for which the goods were sold. But, if trespass had been brought, the defendant must have pleaded specially, and the plaintiff might have recovered damages far beyond the money actually received from the sale of the goods. So, where goods are taken in execution which are not the property of the persons against whom execution is taken out; the owner may waive the trespass, and bring his action for the amount of the money which the goods sold for.

We think this case not within the reason of any, in which hitherto the plaintiff has been allowed to waive the trespass, and bring this action. We think, to allow it would not tend to the furtherance of liberal justice, but would be a prejudice to the defendant, and in a public view inconvenient. Therefore, we agree that the plaintiff was rightly nonsuited at the trial.

Per Cur.

*Rule for a new trial discharged.*¹

¹ In *Newsome v. Graham*, 10 B. & C. 234, the plaintiff was allowed to recover on a count for money had and received, money paid by him to the defendant as his landlord for the rental of premises from which he was afterwards ejected by A., and for the use of which, during the time that he held of the defendant, he was compelled to pay A. *mesue profits*, it not appearing that the defendant, at the time when the action was brought or at the time of trial, claimed to have any title to the land. — *Ed.*

NIBBS v. HALL.

AT NISI PRIUS, BEFORE LORD KENYON, C. J., FEBRUARY 11, 1794.

[*Reported in 1 Espinasse, 84.*]

THIS was an action of assumpsit for use and occupation of certain rooms in the City Chambers. Plea of the general issue, with notice of set-off.

One article of the set-off which the defendant proposed to give in evidence, arose in the following manner. The defendant being indebted to the plaintiff for the rent of other chambers belonging to the plaintiff, which he then occupied, the plaintiff demanded payment at the rent of twenty-five guineas per year. The defendant insisted that he had taken them at twenty guineas per year only, and offered to pay at that rate. The plaintiff refused to take it, and threatened to distrain if not paid at the rate of twenty-five guineas; and the defendant, in order to avoid the distress, paid at that rate, and now brought a witness to prove that the chambers for which he had paid at the rate of twenty-five guineas were really let at twenty guineas; so that he had overpaid the plaintiff, and now proposed to set off the overplus, as having been paid by compulsion, and in his own wrong.

LORD KENYON was of opinion that this could not be deemed a payment by compulsion, as the defendant might have by a replevin defended himself against the distress; that therefore, after a voluntary payment so made, that he should not be allowed to dispute its legality; and therefore rejected the evidence.

Garrow and ——— for the plaintiff.

Erskine for the defendant.

BROWN v. MCKINALLY.

AT NISI PRIUS, BEFORE LORD KENYON, C. J., FEBRUARY 17, 1795.

[*Reported in 1 Espinasse, 279.*]

ASSUMPSIT for money had and received.

Plea of the general issue.

The plaintiff and defendant, being in the same line of business, entered into an agreement by which the defendant agreed to sell the plaintiff all his old iron, except bushell iron, which was of an inferior quality, at 9*l.* per ton.

The iron he delivered was mixed iron of an inferior value, being part bushell iron, and charged the full value of the best sort; the plaintiff objecting to the charge, the now defendant brought an action for it. The plaintiff paid the full demand so made on him, at the same time telling the

defendant that he did it without prejudice, and meant to bring an action to recover back the overplus so paid.

This action was brought for that purpose.

When the case was opened by the plaintiff's counsel, Lord KENYON said, that such an action could not be maintained. That to allow it would be to try every such question twice, for that the same legal ground that would entitle the plaintiff to recover in the present action would have been a good defence to the action brought against him by the present defendant; at which time, and in which manner he should have proceeded: that money paid by mistake was recoverable in *assumpsit*, but here it was paid voluntarily, and so could not be recovered under the circumstances of this case.

Erskine and *Reader* for the plaintiff.

Garrow for the defendant.

DEW v. PARSONS.

IN THE KING'S BENCH, MAY 11, 1819.

[*Reported in 2 Barnewall & Alderson, 562.*]

DECLARATION for work and labor, and money counts. Plea, general issue, and notice of set-off. The action was brought by the plaintiff as sheriff of the county of Hereford, to recover from the defendant, an attorney residing in a neighboring county, 4*s.* 1*d.*, being 3*s.* 6*d.* claimed by the plaintiff as the fee on a warrant issued by him, in a cause in which the defendant was attorney, and 7*d.* for the postage of a letter. The defendant claimed to set off either the whole or part of a sum of 10*s.* 6*d.* which his clerk had paid to the plaintiff on the issuing three warrants under one writ against three defendants. The clerk paid it, on its being claimed by the plaintiff as of right, for the warrants, and on mentioning it to the defendant, the latter disapproved of it, and said that it was an imposition. The plaintiff claimed a fee of 3*s.* 6*d.* for every warrant when issued for an attorney residing out of his county, and 2*s.* 6*d.* when issued for an attorney residing within the county; and it appeared that such fees had for many years usually been paid in the county of Hereford. If he was entitled only to 2*s.* 6*d.* on each warrant, then there was a balance of one penny due to him; if he was entitled to less than that sum, then he was not entitled to recover. At the trial before HOLROYD, J., at the last summer assizes for the county of Hereford, the plaintiff objected that this was a payment made with a full knowledge of all the facts, though under a misapprehension as to his legal liability, and therefore that it could not be recovered back, and consequently was not the subject of set-off. The learned judge admitted the evidence, and was of opinion that the plaintiff was entitled to charge only 4*d.* for each warrant, and the balance of the account being then against

the plaintiff, he was nonsuited. A rule *nisi* having been obtained in last Michaelmas term for setting aside this nonsuit,

Cross now showed cause.

W. E. Taunton, contra.

ABBOTT, C. J. This question comes before the court in a different shape from those which existed in the cases cited. For this is in substance like an action by the sheriff to recover his fees; and in that case, he must by law make out his title to them; and if he does not do so, the defendant will be entitled to set off the sum which has been overpaid. We do not feel ourselves at liberty to say that the usage which is stated to have prevailed is sufficient to have repealed an act of parliament. At the common law, the sheriff was not entitled to make any charge for executing a writ, and therefore, if he has any claim, it must be under the provisions of some statute. That brings us to the consideration of the statute 23 Hen. 6, c. 9; and the question is, whether the word "warrant" there used, in respect of which the sum of 4*d.* only is to be paid, means such a warrant as that for which the charge which is the subject of the present action is made. And it seems to me that it does, and that the sheriff was only entitled to make the charge of 4*d.* for each of these warrants. But if this were not so, it will not materially affect our judgment on the present occasion. For if this case be not within the 23 Hen. 6, c. 9, the sheriff would not be entitled to anything. The charge in this case may be reasonable, but it is contrary to law, and cannot, therefore, be allowed. The consequence is, that this rule must be discharged.

HOLROYD, J.¹ I am of the same opinion, that this nonsuit must stand. If the defendant has paid more money than the sheriff is allowed by law to demand as his fee, the sheriff cannot retain that surplus, and must (if required so to do) return it to the defendant. It follows, therefore, that the defendant has a right of set-off on the present occasion. Now the sheriff is not entitled to any fees, except those given to him by some act of parliament; and the only act within which these warrants seem to be included is the 23 Hen 6, c. 9. By that act, the sheriff is empowered to take only 4*d.* for each warrant. If so, unless some other act of parliament can be found to authorize a larger payment, the sheriff can make no further claim, for no usage can prevail against a positive enactment of the legislature. It is said, that larger sums than those mentioned in the 23 Hen. 6 have been allowed in different cases. But there is not any case which shows that those sums have been allowed upon a claim made by the sheriff or his bailiff; and perhaps those cases can be explained thus. The plaintiff may desire a special bailiff to be named for the purpose of executing the writ, and for that he may be liable to pay a reasonable sum to the sheriff, and that sum may have been allowed to him on his taxation of costs, as being an expense reasonably incurred by him in the course of a cause. In that

¹ BAYLEY, J., had left the court.

way, perhaps, the allowance of one guinea, levy money, mentioned in some of the cases, may be supported. But this case is very distinguishable, and seems to me to fall within the very words of the statute.

BEST, J. Where the sheriff makes a claim for fees he is to be strictly confined to the limits allowed by the law ; but a party who has actually paid the fees claimed in the course of a cause, may be in a very different situation from the sheriff who has claimed them, and may have such allowed to him in taxation of costs as he may reasonably be expected to pay. No act of parliament authorizes the fees claimed in this case ; and it is quite clear, at common law, that the sheriff is entitled to no compensation. Besides, if independently of any act of parliament it were competent for him to establish a claim by usage, still no sufficient usage has been proved to exist in this case ; for that which is stated to exist is quite absurd, being 3*s.* 6*d.* for each warrant, if the attorney resides within the county, and 2*s.* 6*d.* if he resides out of it. If, however, it had been a reasonable usage, it could not have been set up against an act of parliament. The case stands thus : if it be within the statute 23 Hen. 6, the sheriff is entitled to 4*d.* ; if it be not, he is entitled to nothing. Then, as to the question of set-off, I am clearly of opinion that the defendant is entitled to set off what he has overpaid to the sheriff ; for this is not like *Brisbane v. Dacres*,¹ the case of a voluntary payment. In that case, both parties were equally cognizant of the situation in which they stood ; but here that was not the case. Upon the whole, I think the nonsuit was right, and that this rule must be discharged.

Rule discharged.

MORGAN v. PALMER.

IN THE KING'S BENCH, MAY 18, 1824.

[*Reported in 2 Barnwell & Creswell, 729.*]

ASSUMPSIT to recover a sum of 4*s.* paid by the plaintiff, who is a publican in the borough of Great Yarmouth, to the defendant as mayor of that borough, and claimed by the defendant as having become due to him on granting to the plaintiff his annual license as a publican. At the trial before GARROW, B., at the Norfolk Lent assizes, 1823, a verdict was found for the plaintiff, subject to the opinion of this court on the following case. In the month of September, 1822, a meeting was duly held by the defendant (who, in his character of mayor, was then one of the justices of the peace in and for the borough), and by another justice of the peace in and for the borough, for the purpose of renewing the annual licenses of the publicans in the borough. The plaintiff attended at that meeting in order to obtain a renewal of his license, and the clerk to the justices, who is also town clerk,

¹ 5 Taunt. 143.

and clerk of the peace for the borough, on granting to the plaintiff his license, demanded a sum of 12s. 6d., which the plaintiff accordingly paid. The clerk then paid over to the defendant a sum of 4s., part of the sum of 12s. 6d. which he had received, on the account and by the authority of the defendant as mayor; he also paid over a sum of 2s., other part of the said 12s. 6d., to the serjeant at mace, and retained the sum of 4s. 6d. as clerk of the justices, and 2s., the residue thereof, to his own use as clerk of the peace. Great Yarmouth is an ancient and immemorial borough. Until the reign of Queen Anne, the chief officers of the corporation were two bailiffs. Various charters, from the reign of King John to that of Queen Anne, granted to the bailiffs all ancient and usual perquisites, fines, emoluments, and profits, which they had before by pretext of any incorporation, or by reason or pretence of any prescription, use, or custom held, enjoyed, or used. By stat. 1 Anne, st. 2, c. 7, it was enacted, "that when the style of the corporation should be changed from that of bailiffs, aldermen, burgesses, and commonalty, to that of mayor, aldermen, burgesses, and commonalty; the mayor and his successors should have and enjoy all the same fees, perquisites, privileges, and jurisdictions, as the bailiffs had before lawfully and rightfully claimed and demanded." By a charter in the year following, the style of the corporation was changed, and it was thereby provided, that the first mayor therein named and his successors should have and enjoy the same powers, privileges, fees, perquisites, and profits, as the bailiffs in any manner had before held and enjoyed within the liberties and precincts of the said borough. No entries were made of the sums paid for licenses in the books of the corporation, but as far back as living memory went, that is to say, from 1765 up to the time of bringing this action, the same sum of 4s. had been uniformly received by the mayor for the time being from every publican applying for a license, as his usual and accustomed fee for granting it. No notice of the action was given previously to its commencement. The questions for the opinion of the court were, first, whether the plaintiff was bound to give notice of the action previously to bringing the same; second, whether the defendant was entitled to receive the said sum of 4s.;¹ third, whether the plaintiff, having paid the said sum of 4s. in the manner above stated, was entitled to recover it back in this action. The case was now argued by

Rolfe for the plaintiff.

Dover, contra.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover in this action. As to the second point, whether the defendant was entitled to notice of action; if it be conceded that the money was taken by him in his character of mayor, independent of that of a justice of peace, then the 24 G. 2, c. 44, does not apply. If it was taken in the character of justice, or if it were equivocal in which capacity the claim was made, then according

¹ So much of the case as relates to this question has been omitted. — ED.

to the case of *Briggs v. Evelyn*, if the act were done *colore officii*, notice of action must have been given. But the object of that statute was to protect justices accidentally committing an error in the discharge of their official duties, and not where the thing is done for their own personal benefit. This money was taken for the latter purpose, and that removes all doubt as to the necessity of notice. Then as to the last point. It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, "that which you require shall not be done except upon the conditions which I choose to impose," no person can contend that they stand upon anything like an equal footing. Such was the situation of the parties to this action. The case is therefore very different from *Brisbane v. Dacres*, and our judgment must be in favor of the plaintiff.

BAYLEY, J. Then, as to the question whether the money can be recovered in this action; if it had been a free and voluntary payment, there might be some difficulty; but I entirely agree with the observations of my Lord Chief Justice, which show, that the payment was by no means voluntary. There is also another ground upon which it might be put, viz., that as the defendant had a discretion to exercise in granting or refusing licenses, it would be against public policy to allow him to receive fees, by which he might be biassed in the exercise of that discretion; and if so, the objection that this was a free and voluntary payment is inapplicable. As to the notice, I am of opinion, that as mayor, the defendant was not entitled to it. The statute does not apply, unless the act was done by him as a justice; but in the latter capacity he had no pretence for claiming anything. It is, therefore, impossible to say that the money was taken *colore officii*. The case of *Irving v. Wilson*¹ puts the question upon the right principle. There, an excise officer had improperly made a seizure of certain goods, and refused to restore them until the plaintiff paid him a sum of money; and it was held, that that money might be recovered in an action for money had and received, and that it was not necessary to give notice of the action, under the 23 G. 3, c. 70, § 30. For these reasons, I think that the plaintiff must have the judgment of the court.

LITLEDALE, J. As to the notice which it is said should have been given, even supposing the defendant to have made the claim in his capacity of justice of peace, that was not done in the execution of his office. Where a justice orders a man to be apprehended, or his goods to be seized under a warrant, that is done in the execution of his office; and if the goods were afterwards sold, it might be necessary to give notice before an action could be commenced to recover the proceeds. Notice might also be requisite if the party paid money in order to be relieved from some threatened proceeding by a justice; but here, it cannot be pretended that the thing was done in

¹ 4 T. R. 485.

the execution of the defendant's office. If, according to the usual course, the plaintiff was entitled to a license, the defendant was bound to grant it. The granting it was in the execution of his office, but the claim of a fee for so doing certainly was not. Then comes the objection, that this was a voluntary payment. In *Bilbie v. Lumley*, *Brisbane v. Dacres*, and *Knibb v. Hall*, both parties might, to a certain extent, be considered as actors. Here, the plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his license. I think, therefore, that he is entitled to recover it back in this action.

*Judgment for the plaintiff.*¹

HILLS v. STREET.

IN THE COMMON PLEAS, JUNE 16, 1828.

[*Reported in 5 Bingham, 37.*]

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff. At the trial before CASELEE, J., Middlesex sittings after Michaelmas term last, it appeared that the defendant, as broker for H. Elwes, had on the 28th of April, 1827, distrained on the plaintiff for 230*l.* 10*s.* alleged to be due to Elwes for seven quarters' rent.

The defendant, upon written requests made by the plaintiff from time to time, and on condition of his paying the charges for distraining, forbore to remove or sell the goods distrained, the plaintiff engaging to pay the expense of keeping a man in possession. Accordingly, the rent not having been satisfied, the plaintiff, upon the defendant's instances, paid him on the 18th of May 8*l.* 5*s.* as broker's commission on a distress for 230*l.* 10*s.* (at the rate of 5*l.* for the first hundred, and 2*l.* 10*s.* for every hundred over), 4*l.* 4*s.* for the expenses of a man in possession twenty-one days, and 1*l.* for drawing the form of the above-mentioned requests. On the 11th of June he again paid the defendant for the expenses of the man in possession twenty-four days, 4*l.* 4*s.*, and for drawing four more requests 1*l.*, making altogether 19*l.* 5*s.*, which the plaintiff now sought to recover, as having been illegally demanded and paid.

The man in possession having on the 23d of June quitted the house for the purpose of procuring a van to remove the goods distrained, the plaintiff refused to let him in again. In consequence of this a second distress was made on the 16th of July, when the plaintiff replevied.

Early in the transaction the plaintiff had alleged that only six quarters' rent were due, but it did not distinctly appear at the trial whether before or at the time of the payments made to the defendant the plaintiff had expressed any intention to replevy. It appeared, however, that he had

¹ The opinion of HOLROYD, J., has been omitted. — Ed.

objected to the amount of the defendant's charge, when the defendant said, "The law allowed it, and he would have it."

For the defendant it was contended, that the charge for making the distress was reasonable and legal, and that whether the charge for keeping the man in possession were legal or not, yet that having been incurred at the express request of the plaintiff for his sole accommodation, and having been paid voluntarily with a full knowledge of all the facts, it could not now be recovered at the hands of the defendant. *Brisbane v. Dacres*.¹

The learned judge thought, that as the distress in respect of which the charges were made had never been brought to a conclusion, the goods not having been sold, but having actually been replevied under a subsequent distress, it was doubtful whether the charge for distraining could be sustained (the stat. 57 G. 3, c. 93, s. 6, applying only to cases where the goods distrained are sold), and whether the payment could be esteemed voluntary; which he told the jury it could not, if at the time it was made the plaintiff intended to replevy.

Whereupon a verdict was found for the plaintiff for 5*l.* 10*s.* on the sum paid for making the distress, with leave for the defendant to move to set it aside and enter a nonsuit instead. Accordingly

Wilde, Serjt., in Hilary term last obtained a rule *nisi* to that effect; against which

Andrews, Serjt., was to have shown cause; but the court called on

Wilde to support his rule.

BEST, C. J. Although under the circumstances of this case I would allow for the legal expenses of making the distress and inventory, yet this rule must be discharged; for that allowance could not be sufficient to turn the scale in the defendant's favor, the prothonotary stating to us, that on taxation of costs the broker's charge for distraining would not be permitted to exceed one guinea.

But I am clearly of opinion that this was not a voluntary payment. The broker is in possession of goods distrained for rent. The party distrained on is anxious that the goods should not be sold, and that time may be allowed him to pay the rent. The broker requires, as a condition of the indulgence, that he shall be furnished with a written request not to sell, and an undertaking to pay the expenses; this is given and enforced, but it is clear that it is given under an apprehension the sale would proceed unless the demand were complied with; and it is impossible to call a payment under such circumstances, voluntary. If the payment were not voluntary, the plaintiff is entitled to recover back all that was paid improperly which exceeds in amount the verdict he has obtained. *Lindon v. Hooper* only decides that an action for money had and received does not lie to recover back money paid for the release of cattle damage feasant, though the distress were wrongful; replevin or trespass being the proper form of action

¹ 5 Taunt. 143.

to try such a question. But the present question could not have been tried in replevin. There is no form of action but *assumpsit* for money had and received, in which a party can recover money paid, as this was, under duress.

GASELEE, J. The broker is the agent of the landlord, and must look to him for these expenses. But the broker, acting as a public officer, has no right to charge for giving time.

The rest of the court concurred, and the rule was discharged.

ASHMOLE v. WAINWRIGHT AND ANOTHER.

IN THE QUEEN'S BENCH, FEBRUARY 4, 1842.

[*Reported in 2 Queen's Bench Reports, 837.*]

ASSUMPSIT for money had and received and on an account stated. The particular claimed 5*l.* 5*s.*, paid on, etc., by plaintiff to defendants, "in order to obtain possession of certain goods belonging to the plaintiff then in the custody of the defendants, and which said sum," etc., "was paid by the plaintiff under protest that he was not liable to pay the same or any part thereof, or, if liable to pay some part thereof, that the sum claimed by the defendants, namely," etc., "was an exorbitant and unreasonable claim."

Plea: *Non assumpsit*. Issue thereon.

On the trial, before COLERIDGE, J., at the Westminster sittings after Hilary term, 1841, it appeared that, in October, 1839, the defendants, who were common carriers, conveyed certain goods for the plaintiff from Walpole to London, under circumstances which induced the plaintiff to expect that they would make no charge for so doing. The goods, being brought to London, remained some time in the defendants' warehouse, after which, on the plaintiff sending for them, the defendants refused to give them to him except upon his paying 5*l.* 5*s.* for carriage and warehouse room. The plaintiff insisted that he was not liable to pay anything; and that, if he was liable to pay anything, the demand was exorbitant. In an interview which the plaintiff's attorney had with one of the defendants at their place of business, the latter declared that he would receive nothing less than the whole sum demanded. The attorney called again a few days afterwards, and said to the same defendant, "I suppose you still refuse to take anything less than the whole sum;" to which the defendant said, "Of course I do." The attorney then paid him the 5*l.* 5*s.*, and told him that he paid it under protest as to both points. The goods were then given up to the plaintiff. The learned judge put three questions to the jury: 1. Was the plaintiff to pay anything? 2. Was

5*l.* 5*s.* an unreasonable sum? 3. If 5*l.* 5*s.* was unreasonable, what was a reasonable sum? The jury found that the plaintiff ought to pay something; that the demand of 5*l.* 5*s.* was unreasonable; that the reasonable charges were 18*s.* for carriage, and 12*s.* 6*d.* for warehouse room. The learned judge was of opinion that the plaintiff ought to have tendered that or a larger sum: and a verdict was entered for the defendant, with leave for the plaintiff to move to enter a verdict for 3*l.* 14*s.* 6*d.*, if the court should be of opinion that a tender was unnecessary.

In Trinity term last, *Byles* obtained a rule *nisi* accordingly; against which

Kelly and *Cockburn* now showed cause.

Erle and *Byles*, *contra*.

LORD DENMAN, C. J. As is very commonly the case, each party has taken pains to put himself in the wrong. After carriage of the goods without express bargain, the owner, the plaintiff, says that the carriers, the defendants, were to carry them for nothing, and he demands the goods; the defendants claim what must now be taken to be a very exorbitant charge, and refuse to deliver the goods except on payment of 5*l.* 5*s.*; the plaintiff says, I will pay it under protest that I do not owe you so much. The jury find that the proper sum is 1*l.* 10*s.* 6*d.* To the extent of the difference the defendants have received the plaintiff's money; is there anything in the circumstances to deprive him of his remedy as for money received by them to his use? It is said that he ought to have tendered the proper charges: the answer is, that they ought to have told him the proper charges. I can see no other circumstance to deprive the plaintiff of his action in this form: the cases relied on for the defendants are all distinguishable; the utmost extent to which they go is that the action does not lie where there is another adequate remedy; and, as to equity, when the defendants had received such notice as they did, both from the attorney and from the language of the particulars, it was their duty to pay back the sums which they had no right to retain.

PATTESON, J. I should be sorry to throw any doubt upon the point that an action for money had and received will lie to recover money paid on the wrongful detainer of goods; it would be very dangerous to do so, the doctrine being in itself so reasonable, and supported by so many authorities. In *Lindon v. Hooper*¹ replevin was as convenient a mode of recovering the money as the action for money had and received: but replevin would not lie here. My only difficulty has arisen from the necessity for a tender. *Astley v. Reynolds*² at first sight seemed to be somewhat in favor of the present defendants, for there a tender was made: and I am not prepared to go the length of saying that, where a party simply denies that anything is due, then pays, and afterwards sues for the whole sum, he may turn round at the trial and recover part; for his objecting to the

¹ 1 Cowp. 414.

² 2 Stra. 915.

whole would be like a deception. In this case, therefore, had there been nothing to show that the plaintiff ever demanded less than to have the goods without any payment, according to his first claim, I should hardly have said that the action would be maintainable. But, on the further conversation and the subsequent applications, an allegation of overcharge is added to the at first total denial: the defendants always demanded the whole; the plaintiff did not altogether insist that nothing at all was due; then the particulars of demand distinctly show that the action was brought, not merely to recover the whole, but to recover the part overcharged, if the plaintiff was liable at all. After such a notice the proper course for the defendant was to pay the difference into court.

COLERIDGE, J. I never doubted that an action for money had and received might be maintained to recover money paid on the wrongful detainer of goods. *Skeate v. Beale*¹ is not inconsistent with this doctrine. That was an action on a written agreement; duress of goods was pleaded; and the court held that, for that purpose, there was no distinction between an agreement and a deed, so that the agreement must be held to have been voluntary. It is very true that some words in the judgment go beyond the point decided; but they were not necessary to the decision, which is quite consistent with our decision in the present case. Here the only question is on the necessity of tendering or demanding back a specific sum. Taking the particulars altogether, they are clearly meant to convey notice of the plaintiff's intention to recover all or such part as he might be entitled to: and, after hearing the argument, I am satisfied that no tender of any specific sum was necessary. The defendants began wrong by making an exorbitant demand: in whose knowledge, if not in theirs, did the proper charges lie? Surely the duty of ascertaining the proper charge lay on them in the first instance. Looking at the nature of the demand, it could not be for the plaintiff to ascertain the specific sum.

Rule absolute.

WAKEFIELD v. NEWBON AND OTHERS.

IN THE QUEEN'S BENCH, APRIL 16, 1844.

[*Reported in 6 Queen's Bench Reports, 276.*]

ASSUMPSIT for money had and received, and on an account stated.

Plea: *Non assumpsit*.

On the trial, before Lord DENMAN, C. J., at the London sittings after Easter term, 1843, the following facts appeared, according to the statement made by the Lord Chief Justice in delivering the judgment of the court as after mentioned.

¹ 11 A. & E. 983.

"This action was brought by a mortgagor against the mortgagee's solicitors to recover a sum of money which the defendants had exacted from the plaintiff by refusing to redeliver his title deeds after a reconveyance to him of the mortgaged property on payment of principal and interest, unless the plaintiff would also pay the amount of the defendants' bill of costs. The verdict was taken for 11*l.* 12*s.* 5*d.*, the amount so exacted: but the defendants had leave to move for a nonsuit if the court should think the action not maintainable, or for reduction of the damages to 5*l.* if the jury were wrong in deducting certain items from the bill. One of the charges was in respect of the reconveyance; but other parts of the bill arose exclusively from the relation of the mortgagee to the defendants, as client and solicitors."

In Trinity term, 1843, Platt obtained a rule *nisi* accordingly. In Easter term, 1844,

Knowles and Miller showed cause.

Platt and Butt, *contra*.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, May 27th, delivered the judgment of the court. After stating the facts as *ante*, p. 539, his lordship proceeded as follows:—

We are of opinion that the defendants were clearly wrong in withholding the deeds till the latter sum was paid; for it appears from *Hollis v. Claridge*,¹ and is the known practice, that a mortgagee cannot, by handing over deeds to his attorney, create a new lien against the mortgagor in respect of a debt of his own.

But an objection to the maintenance of the action was drawn from certain expressions employed by me in a late judgment of this court, *Skeate v. Beale*.² That case was not alluded to in *Parker v. The Great Western Railway Company*,³ in the Common Pleas, where that court, in conformity to a late decision of the Exchequer⁴ and to some former decisions of this court, laid down the principle that money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received. In this court, we were required, in considering a case of *Ashmole v. Wainwright*,⁵ to give some attention to the doctrine in *Skeate v. Beale*.² It was by no means unsupported by some ancient authorities; but perhaps it was laid down in terms too general and extensive. The case itself, however, was satisfactorily shown to be distinguishable, both from *Ashmole v. Wainwright*⁵ and from the present case: and the principle just stated must be taken as well established and generally recognized. It may produce the inconvenience of a circuity of action: but the evil of allowing extortion by means of a wrongful detention of goods would be much greater; and the wrong-doer has no right to com-

¹ 4 Taunt. 807.

² 11 A. & E. 983, 991.

³ 7 M. & G. 253, 292.

⁴ *Smith v. Sleep*, 12 M. & W. 585.

⁵ 2 Q. B. 837.

plain when he is compelled to restore money which he was warned that he had no right to extort. The case is wholly different from that class where the parties have come to a voluntary settlement of their concerns, and have chosen to pay what is found due.

A third defence was rested on the case of *Bamford v. Shuttleworth*,¹ where a purchaser had paid the agreed price of an estate to the vendor's attorney, but was holden to have no right of action against him for the price, when the purchase went off for defect of title. But there the attorney received the money merely as agent for his client, to whom alone he was responsible for it; here the attorneys insisted on withholding the deeds for their own benefit, to secure the payment of their own bill. It is a mistake to say that there is no privity between the plaintiff and defendants. The privity in the original transaction was indeed between the defendants and their client; but, when the defendants compelled the plaintiff to part with money in order to regain possession of his rights, the law created a privity between them, and implied a promise to repay what the defendants should appear to have improperly obtained.

It follows that the verdict must stand for the plaintiff, the damages being reduced to 6*l.* 12*s.* 5*d.*, the difference between the whole sum received by the defendants and the 5*l.* due from the plaintiff to the defendants.

Rule accordingly.

CLOSE v. PHIPPS.

IN THE COMMON PLEAS, JUNE 4, 1844.

[*Reported in 7 Manning & Granger, 586.*]

DEBT, for money had and received, and upon an account stated. Plea, never indebted.

At the trial, before CRESSWELL, J., at the last Somersetshire assizes, the following facts appeared.

The plaintiff was the administratrix *cum testamento annexo* of her late husband, who had mortgaged certain property to one Welch to secure 1000*l.* and interest. In April, 1843, the defendant, as the attorney for Welch, called in the mortgage-money, and gave the plaintiff notice, that if it were not immediately paid he should proceed to sell the property under a power contained in the mortgage deed. The plaintiff thereupon employed one Vining, an attorney, to obtain another loan in order to enable her to pay off the mortgage; but he did not succeed in so doing. In the mean time the defendant, on behalf of Welch, advertised the property for sale on the 2d of October following. On the 20th of September one James, another attorney employed by the plaintiff, called, on her behalf, upon the defendant

¹ 11 A. & E. 926.

in order to pay off the principal and interest due to Welch, and the defendant's costs. The defendant claimed the further sums, — of 15*l.* for three months' interest in advance; 29*l.* 8*s.* 10*d.* alleged to have been paid by the defendant to Vining for his costs; and 13*s.* 4*d.* which the defendant claimed as due to him from the plaintiff's son, who had some interest in the property. The defendant refused to stop the sale or deliver up the deeds, unless the amount (45*l.* 2*s.* 2*d.*) was paid to him. That sum was accordingly paid under protest; and the present action was brought to recover it back.

It was contended, on the part of the defendant, that the plaintiff could not recover the money, at least in the present form of action, as it had been paid with a full knowledge of all the facts, and, therefore, must be taken to have been paid voluntarily. The learned judge was of opinion that the plaintiff was entitled to recover, and directed a verdict to be entered for her for the full amount, but reserved leave to the defendant to move to enter a nonsuit or to reduce the damages.

Channell, Serjt., in last Easter term, obtained a rule *nisi* accordingly.

Atcherley, Serjt., now showed cause. As a general rule it is undoubtedly true, as established by *Bilbie v. Lumley*,¹ and that class of cases, that money paid with a full knowledge of all the facts cannot be recovered back. So, where money has been paid under a legal adjudication upon the precise point. But the present case falls within a third class of cases, in which it is held that, where money is paid, though with knowledge or means of knowledge of all the facts, but by compulsion, such as duress of the person or of goods, it may be recovered back. It has been always held that a bond or agreement might be avoided by reason of duress of the person; although some doubts appear to have been entertained whether the same rule applied where there was only duress of goods. In *Skeate v. Beale*,² which was an action on an agreement to pay money, the defendant pleaded that the plaintiff had distrained upon his goods for more than was due, and threatened and was about to sell the goods, whereupon the defendant made the agreement to avoid such sale. The plea was held bad; but the court, in giving judgment, pointed out that there might be a difference where an action for money had and received was brought to recover money paid under such circumstances and under protest. And in *Astley v. Reynolds*,³ it was expressly held that where money is extorted by duress of goods, it may be recovered in assumpsit for money had and received. This case was confirmed in *The Duke de Cadaval v. Collins*; ⁴ and the principle was also recognized by the Court of Queen's Bench this term, in *Wakefield v. Newbon*.⁵ In *Knibbs v. Hall* ⁶ the money was not paid under protest; nor in *Lindon v. Hooper*,⁷ where in the absence of such protest, an action for money had and received was held not to lie to recover back money paid for the release

¹ 2 East, 469.

² 11 A. & E. 983; 3 P. & D. 597.

³ 2 Stra. 915.

⁴ 4 A. & E. 858; 6 N. & M. 324.

⁵ 6 Q. B. 276.

⁶ 1 Esp. 84.

⁷ Cowp. 414.

of cattle wrongfully taken as damage feasant. [CRESWELL, J. That was to avoid circuity of action. TINDAL, C. J. All the cases were brought before this court, in *Parker v. The Great Western Railway Company*,¹ where the company having made unreasonable charges for the carriage of goods to one particular carrier, who had paid them under protest, we held that he might recover the amount of such payments in an action for money had and received, upon the ground that such payments were not voluntary, but were made in order to induce the company to do that which they were bound to do, without requiring such payments. In that case we relied a good deal upon — *v. Pigott*,² which is strongly in point here. There is some course of practice, I believe, in the court of chancery, where a mortgagor wishes to pay off the mortgage-money suddenly, and the mortgagee does not wish to receive it, under which the matter is sent to the Master to see upon what

¹ 7 M. & G. 253. In *Parker v. The Great Western Railway Company*, TINDAL, C. J., after denying the right of the defendant to make the charges in question, proceeded as follows:—

“But it remains to be considered whether the money so paid can be recovered by the plaintiff, in this action.

“It was argued for the defendants that it cannot; for, that the payments were made voluntarily, with a full knowledge of all the circumstances; and that the plaintiff was not compelled to make those payments, but, in each case, must be considered as having made a contract with the company to pay them a certain sum of money as the consideration for the carriage of his goods; and that having made such contracts, he cannot now retract, and recover the money paid in pursuance of them. In support of this argument *Knibbs v. Hall* (1 Esp. 84), *Brown v. McKinally* (1 Esp. 279), *Bilbie v. Lumley* (2 East, 469), and *Brisbane v. Dacres* (5 Taunt. 143), were cited. On the other side, it was urged, that these could not be considered as voluntary payments; that the parties were not on an equal footing; that the defendants would not, until such payments were made, perform that service for the plaintiff which he was entitled by law to receive from them without making such payments; and that, consequently, he was acting under coercion; and in support of this view of the case, *Dew v. Parsons* (2 B. & A. 562; 1 Chit. 295), *Morgan v. Palmer* (2 B. & C. 729; 4 D. & R. 283), and *Waterhouse v. Keen* (4 B. & C. 260; 6 D. & R. 257), were referred to.

“We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which, an action on the case might have been maintained, as was expressly decided in the case of *Pickford v. The Grand Junction Railway Company*. And, in this respect, the case very much resembles that of — *v. Pigott*, mentioned by Lord KENYON, in *Cartwright v. Rowley* (2 Esp. 723). That was an action brought to recover back money paid to the steward of a manor, for producing at a trial some deeds and court rolls, for which he had charged extravagantly. The objection was taken that the money had been voluntarily paid, and so could not be recovered back again; but, it appearing that the party could not do without the deeds, so that the money was paid through necessity and the urgency of the case, it was held to be recoverable. We think the principle upon which that decision proceeded is a sound one, and strictly applicable in the present case, and that the defendants cannot, by the assistance of that rule of law on which they relied, retain the money that they have improperly received.” — Ed.

² Cited by Lord KENYON, C. J., in *Cartwright v. Rowley*, 2 Esp. 723.

terms an arrangement can be made as to the payment of some interest in advance.] Here, the money was called in by the mortgagee.

Talfourd, Serjt., who was to have supported the rule, admitted he could not do so after the decision in *Parker v. The Great Western Railway Company*.

TINDAL, C. J. This, I think, is quite as strong a case as that referred to. The money was obtained by, what the law would call, duress; as the plaintiff was obliged either to pay it, or to suffer her estate to be sold, and incur the expense and risk of a bill in equity.

Per Curiam;

Rule discharged.

GULLIVER v. COSENS.

IN THE COMMON PLEAS, MAY 31, 1845.

[*Reported in 1 Common Bench Reports*, 788.]

DEBT for money had and received to the plaintiff's use. Plea, *nunquam indebitatus*.

At the trial before ALDERSON, B., at the last assizes for Sussex, it appeared that a flock of sheep belonging to the plaintiff having strayed upon the defendant's land, they were distrained, as damage feasant, by the defendant, who refused to restore them except upon payment of 2*l.* 15*s.* 9*d.*, at which amount he estimated the damage they had done. The plaintiff paid the 2*l.* 15*s.* 9*d.* under protest, and to recover it brought this action.

For the defendant it was insisted, upon the authority of *Lindon v. Hooper*, that the action was not maintainable; and that where an exorbitant demand was made for compensation, the only remedy was replevin.

The learned judge directed a nonsuit, reserving to the plaintiff leave to move to enter a verdict for the sum claimed, if the court should be of opinion that the action was well brought. The actual damage done by the sheep was estimated by the jury at 5*s.*

Sir *T. Wilde*, Serjt., in Easter term last, accordingly obtained a rule *nisi*.

Channell, Serjt., with whom was *Johnson*, now showed cause.

Dowling, Serjt., with whom was *Bovill*, in support of the rule.

TINDAL, C. J. I am of opinion that the rule that has been obtained in this case, to enter a verdict for the plaintiff, ought to be discharged. The question at issue seems to me to depend upon the consideration, upon which of the parties has the law cast the onus of estimating the amount of damage done to the owner of the land? The party whose sheep have trespassed is in the first instance the wrong-doer; it is therefore upon him that the risk of estimating the amount of damage ought to rest, and not upon the party who has suffered by the trespass. If the owner of the cattle

elects to make a tender of sufficient amends before the distress, and the distrainer refuses it, the latter becomes a wrong-doer; but a tender after distress does not entitle the owner to replevy his cattle. The rule of law cannot be more clearly stated than is done by Lord COKE, in *The Six Carpenters' case*¹: "*Vide* the book in 30 Ass. pl.^o 38,² *John Matrever's case*. It is held by the court that if the lord or his bailiff comes to distrain, and before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage feasant, if before the distress he tenders sufficient amends; and therewith agree 7 Ed. 3, 8 b.,³ In the *Master of St. Mark's case*; and so is the opinion of HULL to be understood in 13 Hen. 4, 17 b.,⁴ which opinion is not well abridged in title *Trespas*, 180.⁵ Note, reader, this difference: that tender upon the land before the distress makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful; tender after the impounding makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet, if the plaintiff makes him a sufficient tender, he may have an action of detinue for the detainer after; or he may, upon satisfaction made in court, have a writ for the redelivery of his goods." It appears to me that when the present plaintiff found he was too late to make a tender, so as to entitle himself to replevy the sheep and to succeed in an action of replevin, his proper course was to make a tender of sufficient amends to cover the damage sustained; and in the event of the defendant refusing to accept the sum tendered and deliver up the sheep, he should have brought detinue; for they were held by the defendant merely as a pledge. In that case the hazard of the sufficiency of the tender would fall, as it ought to do, on the owner of the cattle. It has been urged that here a tender was unnecessary, inasmuch as the sum demanded for compensation was exorbitant; that argument, however, as it seems to me, is answered by saying that the risk of determining the real amount of damage is not by law imposed upon the defendant. This I should be disposed to hold upon principle, and independently of the authority of *Lindon v. Hooper*, which I am unable to get over, and which I am not aware has been overruled; and though cases have occurred in which it has been decided that an excessive demand dispenses with a tender, yet those were cases where the law made it incumbent on the defendant correctly to ascertain the amount of his demand. The cases of *Barrett v. The Stockton & Darlington Railway Company*, and of *Parker v. The Great Western Railway Company*, range themselves within this class. The cases of *Knibbs v. Hall*, and *Skeate v.*

¹ 8 Co. Rep. 147.² Fo. 179, *Mantravers v. The Parson of Chase*.³ H. 7 E. 3, fo. 8, pl. 17.⁴ H. 13 H. 4, fo. 17, pl. 14.⁵ Fitzh. Abr. tit. *Trespas*, pl. 180. See the explanation in 6 Nev. & M. 613, n.

Beale follow the doctrine of *Lindon v. Hooper*. Upon authority, therefore, as well as upon principle, I am of opinion that the verdict which has been entered for the defendant ought to stand.

COLTMAN, J. I also think the law has with sufficient distinctness pointed out the course which the plaintiff ought to have pursued. And if he has brought a difficulty upon himself by departing from that course, he has no right to complain. The objection to bringing an action for money had and received, instead of tendering amends and replevying, is that which has been stated by my Lord Chief Justice; namely, that it would remove from the owner of the cattle the burthen of ascertaining the precise amount of compensation due, and cast it upon the other party, who, in the absence of a tender, is no wrong-doer. The case differs essentially from that of *Parker v. The Great Western Railway Company*. There the company, by refusing to carry the plaintiff's goods without being paid an exorbitant sum, in contravention of the provisions of the acts of Parliament by which their concerns are regulated, became wrong-doers. Nor can it be said that in this case the money was extorted by duress. Duress of goods implies an unlawful detention of them; which has not occurred here, the sheep having been lawfully taken. I am unable to distinguish the present case from *Lindon v. Hooper*, and I know of nothing to prevent its being treated as a subsisting authority. For these reasons I think the rule should be discharged.

MAULE, J. I also am of opinion that under the circumstances of this case money had and received is not the proper form of action. The defendant had an undoubted right to distrain the plaintiff's sheep, and to keep them until the damage done was satisfied. If a sufficient tender had been made before the impounding, the defendant would have been bound to restore them; otherwise not. The question is, whose duty it is to ascertain the amount of damage sustained. If that duty were by law cast upon the distrainer, it would manifestly be throwing a very inconvenient burthen upon the innocent party. It seems to me to be quite clear that this duty rests upon the party who inflicts, and not upon him who suffers, the injury. That being so, the defendant is not a wrong-doer because he may have too highly estimated the compensation due to him. It is said that the plaintiff ought to be permitted to maintain this action, because he is under the circumstances precluded from bringing a replevin. The reason why he has not that remedy is, that he has sustained no wrong. His proper course was to make a tender of sufficient amends; and if the defendant, upon such tender, refused to restore the sheep, to bring an action of detainue, as suggested by Lord COKE in the *Six Carpenters' case*.¹ The case of *Anscomb v. Shore*,² where it was held that an action on the case lay not for the detention of the goods after a tender made of sufficient amends, goes very far to show that money had and received is not main-

¹ 8 Co. Rep. 147.

² 1 Taunt. 261.

tainable in this case, inasmuch as it shows that the distrainer was not a wrong-doer.

CRESSWELL, J. The plaintiff in this case has brought an action for money had and received by the defendant to his use. The defendant, in answer, says the payment was made voluntarily, with full knowledge of all the facts, and therefore it is not recoverable back. On the part of the plaintiff it is suggested that the payment was made under a species of duress, — a wrongful detainer of his sheep. According to the rule laid down in the *Six Carpenters' case*, it appears that there has been no such wrongful detainer of the plaintiff's sheep. That ground therefore fails. The payment appears to me to have been made for the purpose of avoiding all question or dispute as to the right to distrain. The plaintiff cannot, therefore, now turn round and recover back the money which he so paid upon an adequate consideration.

Rule discharged.

STEELE v. WILLIAMS.

IN THE EXCHEQUER, MAY 7, 1853.

[*Reported in 8 Exchequer Reports, 625.*]

ACTION for money had and received for the use of the plaintiff. Plea, never indebted.

At the trial, before the judge of the Sheriff's Court of London, it appeared that the action was brought by the plaintiff, an attorney, to recover from the defendant, who was the parish clerk of St. Mary, Newington, the sum of 4*l.* 7*s.* 6*d.*, paid by the plaintiff's clerk to the defendant, for fees claimed in respect of searches made and extracts taken from the Register Book of Burials and Baptisms in that parish. The plaintiff's clerk applied at the defendant's house, where the registers were kept, for permission to search them. He told the defendant that he did not want certificates, but only to make extracts. The defendant said, the charge would be the same, whether he made extracts or had certificates. The plaintiff's clerk searched through four years, was engaged two hours, and took twenty-five extracts, namely, twelve burials and thirteen baptisms. He inquired of the defendant what was his charge, and the defendant replied 3*s.* 6*d.* for each extract, amounting in the whole to 4*l.* 7*s.* 6*d.*, which the plaintiff's clerk then paid, and took from the defendant the following receipt: —

ST. MARY, NEWINGTON.

Twenty-five certificates, at 3*s.* 6*d.* each 4*l.* 7*s.* 6*d.*

Received — WM. WILLIAMS, Parish Clerk.

Nov. 17, 1852.

Name — Taylor.

The defendant said, the charge was for the rector, who paid him 1s. 3d. for keeping the books. No mention was made as to the amount of the charge before the search. On the same day the plaintiff sent to the defendant the following letter:—

SIR,—I have to request that you will forthwith repay me 4*l.* 7*s.* 6*d.*, which you have this day compelled my clerk to pay you for his taking extracts from the parish register of St. Mary, Newington, otherwise I shall take proceedings for recovering the same, as you had no right to make the charge. He searched for four years, and I have no objection to your retaining the usual charges for searches, but no more. I request your immediate attention. I am, etc.,
A. R. STEELE.

To the above letter, the defendant returned the following answer:—

SIR,—I have to acknowledge the receipt of your letter of the 17th instant, relative to the sum of 4*l.* 7*s.* 6*d.* paid by your clerk to me for searches and copies of entries in the register books of this parish; and in answer have to state, that the searches and copies were made at your clerk's express wish, and that he was not compelled to pay for the same, but voluntarily paid the usual charges for what he obtained. He stated, that he wanted certificates of all entries in the name of Taylor, between 1827 and 1830 inclusive; and when he had searched found that the number of these amounted to twenty-five, of which he made and retained accurate copies, which he might have had certified under the hand of the rector had he wished it; but as solicitors, very frequently, when making extracts from our registers, decline this on account of saving them expense when making affidavits, I was not surprised at his not requiring it. In this instance you may, however, have the extracts certified by the rector, if you wish it; but as your clerk paid only the usual charges for what he required, namely, 1*s.* for each search, and 2*s.* 6*d.* for each certificate, I cannot be fairly asked to return any part of the amount, and must decline to do so. I am, etc.,
WILLIAM WILLIAMS, Parish Clerk.

It was submitted, on the part of the defendant, first, that the defendant was not the proper party to be sued, but the action should have been against the rector; secondly, that the claim was not illegal; and thirdly, that the payment was voluntary. It being, however, agreed on both sides, that the question was one of law for the decision of the judge, he decided that the payment was voluntary, and directed a verdict for the defendant, reserving leave for the plaintiff to move to enter a verdict for 4*l.* 7*s.* 6*d.*, or any smaller sum, if the court should be of opinion that the defendant was the proper party to be sued, that the demand was illegal, and the payment not voluntary.

Willes, in the present term, obtained a rule *nisi* accordingly; against which,

Robinson showed cause.

Willis appeared in support of the rule, but was not called upon.

PARKE, B. The judge of the Sheriff's Court decided the matter of law, and left it to us to say whether or not his decision is right. I think that, upon the true construction of the evidence, the payment in this case was not voluntary, because, in effect, the defendant told the plaintiff's clerk, that if he did not pay for certificates when he wanted to make extracts, he should not be permitted to search. The clerk had a perfect right, at all events, to search, and during that time to make himself master, as he best could, of the contents of the books; and the defendant, in whose custody they were, could not, because the clerk wanted to make extracts, insist on his having certificates with the signature of the minister. For one shilling he would be entitled to look at all the names in a particular year. He would have no right to remain an unreasonable time looking at the book, nor probably to require the parish clerk to put it in his hands, for it is the duty of the latter to superintend the search, and keep a control over the book. But if a person insists upon himself taking a copy, that is a different matter; the statute only provides for a certificate with the name of the minister, and for that he must pay an additional fee. It was, therefore, an illegal act on the part of the defendant to insist that the plaintiff should pay 3s. 6d. for each entry of which he might choose to make an extract. I also think that the defendant is the proper party to be sued. The doctrine laid down in *Sadler v. Evans* only applies to the legal receipt of fees. But the case of *Snowdon v. Davis* shows, that if a person acting for another insists on the payment of money on an illegal ground, he is the party to be sued for it. Therefore, in the first place, I think that there is evidence that this payment was not voluntary, but necessary for the exercise of a legal right; and further, I by no means pledge myself to say that the defendant would not have been guilty of extortion in insisting upon it, even without that species of duress, viz. : the refusal to allow the party to exercise his legal right, but *colore officii*. *Dew v. Parsons* certainly goes to that extent. But it is not necessary to decide this case on that ground. The rule will, therefore, be absolute to enter a verdict for the plaintiff for the sum of 3*l.* 14*s.* 6*d.*

PLATT, B. I am also of opinion that the verdict ought to be entered for the plaintiff. Under the 6 & 7 Will. 4, c. 86, s. 35, there are only two things in respect of which the incumbent is entitled to fees, namely, for a search and for a certified copy of the register. A fee of 1*s.* is allowed for a search throughout the whole period of the first year, and 1*s.* 6*d.* for every additional year. Those are all the fees demandable in respect of a search. With regard to taking extracts, no fee is mentioned, and the incumbent has no right to tax any one for so doing. But, inasmuch as before the search began the defendant told the plaintiff's clerk that the charge would be the same whether he made extracts or had certified copies, and under that

pressure the extracts were obtained, and it would have been most dishonorable for the party, after having got the extracts, to refuse to pay, the money so obtained may be recovered back. The defendant took it at his peril; he was a public officer, and ought to have been careful that the sum demanded did not exceed the legal fee. As to the defendant being the proper person to be sued, it is almost useless to make any observation. He was not justified in taking the money, and is responsible for his own illegal act.

MARTIN, B. I am entirely of the same opinion. The judge of the Sheriff's Court considered the particular question, whether or not this was a voluntary payment, and decided that it was; but he goes on to state, that if this court shall be of opinion that the defendant was the proper party to be sued, and that the demand was illegal and the payment not voluntary, we are to give judgment accordingly. I am clearly of opinion that the defendant is the right person to be sued, though he acted on behalf of another, who was the officer appointed under the act of Parliament. Any person who illegally takes money under color of an act of Parliament is liable to be sued for it, though the money is not to go into his own pocket. It is different from a payment of money to an agent for the purpose of being paid over to the principal, for there the payment is voluntary. Here the money was paid by virtue of the office of the rector. Mr. *Robinson* has argued, that because the act of Parliament allows a fee for a search and for a certified copy, but no fee is mentioned for taking an extract, it is competent for the parish clerk to demand for it any fee he pleases. I am clearly of opinion that he is not. If a person is authorized to receive money by virtue of an act of Parliament, it is like a contract between the parties, that the sum allowed shall be all which he is to receive, and he is as much bound by the entirety of what he is authorized to take as he would be by the entirety of a sum in a contract. The defendant was entitled to be paid for a search and for a certified copy, but there was no intermediate payment. As to whether the payment was voluntary, that has in truth nothing to do with the case. It is the duty of a person to whom an act of Parliament gives fees, to receive what is allowed, and nothing more. This is more like the case of money paid without consideration, — to call it a voluntary payment is an abuse of language. If a person who was occupied a considerable time in a search gave an additional fee to the parish clerk, saying, "I wish to make you some compensation for your time," that would be a voluntary payment. But where a party says, "I charge you such a sum by virtue of an act of Parliament," it matters not whether the money is paid before or after the service rendered; if he is not entitled to claim it, the money may be recovered back.

Rule absolute to enter a verdict for the plaintiff for 3l. 14s. 6d.

BATES v. THE NEW YORK INSURANCE COMPANY.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, OCTOBER
TERM, 1802.

[*Reported in 3 Johnson's Cases, 238.*]

THIS was an action of assumpsit, for money had and received to the plaintiff's use. Plea, *non assumpsit*. At the trial the defendants waived all exceptions to the form of the action, and rested on the merits only.

Norman Butler subscribed for fifty shares in the New York Insurance Company; each share being of the value of 50 dollars. On the 22d day of July, 1796, Butler assigned to the plaintiff all his right and interest in the fifty shares. By the articles of association of the defendants, the sum of 10 dollars on each share was payable at five different instalments; on the 1st of May, 1796, the 20th of July, 1796, the 20th of January, 1797, the 20th of July, 1797, and the 20th of January, 1798. It appeared by the articles of association, that no transfer of any share could be permitted or be valid, until all the instalments on such shares were paid. The two first instalments were paid by Butler, and the three last by the plaintiff, who regularly received a notice of such payment being due, from the secretary of the company, directed however, to Norman Butler. It was also proved by the secretary of the company, that on the 20th day of January, 1797, he knew of the assignment from Butler to the plaintiff; and that, from that day to the 20th of January, 1798, three dividends were made, amounting in the whole to 525 dollars, on the fifty shares; which sum the defendants had credited on three certain notes given by Norman Butler to them. The first note was dated 3d of June, 1795, for 1,001 dollars and 25 cents, payable in six months, and the other two amounted to 251 dollars and 25 cents, dated the 21st of September, 1796, payable six months after date; which notes were given for premiums of insurance; and by return of premiums, the sum due on the three notes was reduced to 990 dollars; and after crediting the 525 dollars, the amount of the three dividends, a balance remained due from Butler to the defendants, of 465 dollars. The defendants refused to transfer the shares which had been assigned to the plaintiff by Butler, until that sum was paid, which the plaintiff accordingly paid, and the transfer was made. Butler, on the 20th of January, 1798, was insolvent; and on that day the last instalment was paid on the fifty shares, and the plaintiff requested a transfer to be made, which the defendants refused to make, until the balance due on the three notes above mentioned was paid. It was also proved by the secretary of the company, that it was common to make assignments of stock, and

that it was their practice to send notices, when the instalments became due, to the persons to whom the stock had been assigned.

The jury found a verdict for the plaintiff for 990 dollars, subject to the opinion of the court, on a case containing the above facts; and the questions raised for the determination of the court were, whether the plaintiff ought to recover anything; and, if so, whether he should recover the 990 dollars, being the amount of the three dividends made after his assignment, together with the money paid by him in order to procure the transfer; or, whether he should recover only the 465 dollars, the money demanded of him, and paid at the time the transfer of the stock was made.

Pendleton and Wilkins, for the plaintiff.

Hoffman, *contra*.

THOMPSON, J., delivered the opinion of the court. We are of opinion that judgment ought to be given for the plaintiff; but the question as to the amount seems to divide itself into two distinct considerations. In the first place, whether the 465 dollars were paid under such circumstances of compulsion, that the plaintiff ought to recover it back, or whether it must be considered as a voluntary payment, and coming within the rule *volenti non fit injuria*. And, in the second place, whether the defendants, holding those notes against Butler, were authorized to appropriate the dividends on those shares to the payment of the notes after they had received notice of the assignment of the stock to the plaintiff.¹

The equitable extension of this kind of action has of late been so liberal, that it will lie to recover money obtained from any one, by extortion, imposition, oppression, or taking an undue advantage of his situation. In the present case, there was, at least, an undue advantage taken of the plaintiff's situation. He had purchased of Norman Butler the fifty shares; a regular assignment was made to him; but the transfer could not be completed without the assent of the defendants. He had given notice to the defendants of the assignment, and had paid them three instalments, amounting to 1500 dollars; and no information appears to have been given to him by the company, that they had any demand against Butler, who had now become insolvent, and the plaintiff had no mode of indemnifying himself, for the money paid Butler, or for the instalments which he had paid, but by some means or other procuring a transfer of the stock which he had purchased, which the defendants refused to make, unless he paid them the 465 dollars, which was not then due from Butler to them. The purchase of the stock had been made by the plaintiff, and the business transacted according to the usage and practice before adopted by the defendants, and he had reasonable grounds to believe, when he made the purchase, that the transfer would be made to him, agreeably to the former practice of the company, and which they in equity and good conscience were bound to do. The money being inequitably demanded of him, he must be presumed to

¹ So much of the opinion as relates to this question has been omitted. — Ed.

have paid it, relying on his legal remedy to recover it back. In the case of *Astley v. Reynolds*,¹ money paid under circumstances less coercive than in the present case was recovered back in this form of action. In that case the plaintiff had pawned some plate to the defendant, and, when he came to redeem it, the defendant refused to deliver it up, unless he was paid an exorbitant premium, which was paid, and an action brought to recover the money back. The court, in giving judgment, said that it was a payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business; that where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will. In the case of *Irving v. Wilson*,² and also of *Hunt, Executor, etc. v. Stokes*,³ the same principles are fully recognized and adopted.

It is contended, on the part of the defendants, that this was a voluntary payment, and, therefore, not recoverable back; and to establish this, two cases have been cited, *Brown v. McKinnaly*,⁴ and *Bize v. Dickason*.⁵ But on examination, those cases do not compare with the present. The former case appears to have been decided on the ground that the money for which the action was brought had been paid pending a former suit, and that the plaintiff, Brown, might have interposed, as a defence in that action, the same matter on which he then relied to recover; and that to allow him to sustain his action would be to try every such matter twice. In the latter case, the money for which the action was brought in equity and conscience belonged to the defendant; and although the plaintiff could not in law have been compelled to pay it, yet after he had voluntarily paid it, the court on that ground refused to sustain an action to recover it back. On the whole, we are of opinion that the 465 dollars could not, under all circumstances, be considered a voluntary payment, but as made in some measure by compulsion, an undue advantage having been taken of the plaintiff's situation, and that he ought to recover it back.

Judgment accordingly.

JOHN CAREW v. ALEXANDER RUTHERFORD AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER
TERM, 1870.

[*Reported in 106 Massachusetts Reports, 1.*]

CONTRACT against Alexander Rutherford, Joseph Wagner, Edward Shea, William Cooney, and the "Journeymen Freestone Cutters' Association of Boston and vicinity, an unincorporated association composed of the defend-

¹ 2 Stra. 915.

² 4 T. R. 485.

³ 4 T. R. 561.

⁴ 1 Esp. 279.

⁵ 4 T. R. 285.

ants personally named and other persons to the plaintiff unknown," to recover back \$500 as money had and received by the defendants to the plaintiff's use.¹

Service was made on the individual defendants, who appeared and answered that "they admit that it is true that there is an association called the Journeymen Freestone Cutters' Association of Boston and its vicinity, and that they are members of such association; they allege that the plaintiff, at the time of making the payment set forth in his declaration, was also a member of said association; they are ignorant whether the plaintiff paid the sum of \$500 at the time alleged to said association, and leave him to prove the same, if competent; they deny that the plaintiff paid the same to them, or either of them, personally; they deny each and every other allegation than as above admitted, in the plaintiff's declaration contained; and they further say that, if at the trial the plaintiff shall introduce evidence tending to show that he paid the sum of \$500 to said association, then they aver that such payment was made by him to said association as an initiation fee into said association, and that he was present at the meeting at which the vote was passed fixing the initiation fee at such sum, and after such vote paid the same voluntarily to his own use as well as to others', and therefore is not entitled to maintain this action."

At the trial in the Superior Court, before BRIGHAM, C. J., without a jury, the judge found these facts:—

"The plaintiff in August, 1868, was a freestone cutter at South Boston, and had contracted to furnish cut freestone for various buildings, among which was the Roman Catholic cathedral in Boston, in large quantity and at a contract price of \$80,000. The defendants, and sixteen other persons, all journeymen freestone cutters, and members of an unincorporated association called the Journeymen Freestone Cutters' Association of Boston, Charlestown, Roxbury, and their vicinities (of which association the plaintiff was not a member), together with eight or ten laborers, who were not journeymen stonecutters or skilled laborers, and four apprentices to the freestone cutting trade, constituted the stonecutting force relied upon by the plaintiff to fulfil his said freestone contracts. [The constitution and by-laws of the association were put in evidence.²] On the morning of August 18, 1868, the defendant William Cooney, president of said association, who was foreman in the plaintiff's establishment, notified the plaintiff that on the evening of the day before, at a special meeting of the association, it was voted that the plaintiff should pay to the association the sum of \$500 as a penalty imposed upon him by the association because he had sent to New York to be executed some of the freestone cutting to be done under his contract for the cathedral; and upon the plaintiff's refusal to make such payment, all the journeymen freestone cutters employed by him (among

¹ The declaration contained also a count in tort which has been omitted. — Ed.

² This evidence has been omitted. — Ed.

them, the defendants) left the plaintiff's service in a body, agreeably to said vote and the rules of said association. At his request, the plaintiff was permitted to appear at a meeting of the association and explain the circumstances which induced him to send a part of the stonecutting work required for the cathedral to New York to be executed; and, after explaining that his action in that matter was because of his not having the proper stock for that part of the work when he could procure journeymen to work upon it, and when, having procured such stock, he could not procure a sufficient force of journeymen to work it, there was a motion made and debated in the association, that the previous vote, to the effect that members should withdraw from the plaintiff's service unless he paid \$500 as aforesaid, should be reconsidered and rescinded; but the association refused to reconsider or rescind the vote. At this meeting, said vote was read to the plaintiff by the secretary of the association. On the same night or the next morning, the defendants Cooney and Shea, and others, told the plaintiff that all the association men in his shop would desert him at once unless he paid the \$500, and that the association refused to rescind the vote. The plaintiff refused to pay, and all his men left his shop at once and in a body, under the lead of Cooney and Shea; and the plaintiff was without men for a week or ten days, and until after he had made the payment of \$500 as hereinafter stated. Previously to the payment of the money, and after the men had left him, Cooney and others of the defendants told the plaintiff that neither these men, nor any association men, would be allowed to work in his shop, if he refused to pay the money demanded. In consequence of the withdrawal of the defendants and the other journeymen, the freestone cutting which the plaintiff had contracted to do was stopped, because it was impossible for the plaintiff to procure journeymen or other freestone cutters, who were not members of said association, and who had such skill as was required for the fulfilment of his contracts. Several days after the defendants and the other journeymen had withdrawn from the plaintiff's service, the plaintiff, induced by the necessity of doing so to fulfil said contracts and continue his other stonecutting work, paid to the defendants, to the use of said association, the sum of \$500, on August 26, 1868; and the defendants and other journeymen, who had withdrawn as aforesaid, returned to the service and employment of the plaintiff. Said payment was made by the plaintiff as follows. He first made a check payable to the order of the association. This the defendants Cooney and Wagner refused to take, on the ground that no one of those active in procuring it was willing to indorse it. The plaintiff then made a check payable to Wagner or bearer, and gave this check to Cooney, and he, Wagner, and others went with the plaintiff to the bank, when the money was passed to Wagner's credit as treasurer of the association. No receipt was given to the plaintiff for this money."

The judge further found as a fact "that the money demanded of the

plaintiff was demanded without right, and not under any contract or agreement between him and the defendants."

Upon these findings the judge ruled that the facts would not sustain the action, and ordered judgment for the defendants. The plaintiff alleged exceptions.

E. F. Hodges and J. F. Barrett, for the plaintiff.

S. J. Thomas, for the defendants.

CHAPMAN, C. J. The declaration contains a count in tort, and a count for money had and received. The count in tort alleges, in substance, that the plaintiff was engaged in carrying on the business of cutting freestone in Boston, and employed a great many workmen, and had entered into a contract with builders to furnish them with such stone in large quantities; and the defendants, conspiring and confederating together to oppress and extort money from him, and pretending that he had allowed some of said builders, with whom he had made contracts, to withdraw from his shop a part of the work he had contracted to do, and to procure the same to be done out of the State, caused a vote of the Journeymen Freestone Cutters' Association of Boston to be passed, to the effect that a fine of five hundred dollars was levied upon the plaintiff, and read the vote to him, and threatened him that unless he paid the fine they would, by the power of the association, cause a great number of the workmen employed by him to leave his service; that he refused to pay it, and the defendants caused twelve of his workmen to leave his service for that reason, at their instigation. They further threatened him that, unless he paid the fine, they would, by the power of the association, prevent him from obtaining suitable workmen for carrying on his business, and did so prevent him till he paid the fine, and thus extorted from him the sum of five hundred dollars.

Trial by jury was waived, and the facts found by the judge are reported. It appeared that the plaintiff had made a contract to furnish stone for the Roman Catholic cathedral in Boston, and had employed journeymen to do the work, and relied upon them to fulfil his contracts; and the facts stated in the declaration were substantially proved. The plaintiff was not a member of the association. He had sent some of his work to be done in New York because he could not obtain a sufficient force to do it in Boston, and had not proper stock for the work. If the action can be maintained it is on the ground that the defendants have done the acts alleged, in violation of the legal rights of the plaintiff.

By the Gen. Sts. c. 160, § 28, which is cited by the plaintiff's counsel, "whoever, either verbally or by a written or printed communication," "maliciously threatens an injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, shall be punished" as the section prescribes. As this is a penal statute, perhaps it does not extend to a threat to injure one's business by

preventing people from assisting him to prosecute it, whereby he loses his profits and is compelled to pay a large sum of money to those who make the threat, though the threat is quite analogous to those specified in the statute, and may be not less injurious. We shall therefore consider, not whether the acts alleged and proved against the defendants were unlawful within the statute, but whether they were so at common law.

The constitution and by-laws of the Journeymen Freestone Cutters' Association, whose agents the defendants profess to have been, have been laid before us. We have not had occasion to examine them critically; for the doctrine stated in *Commonwealth v. Hunt*¹ is unquestionably correct, namely, that, when an association is formed for purposes actually innocent, and afterwards its powers are abused, by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who misuse it, but not in the other members of the association. Upon the same principle, if the wrongful acts done are tortious, whether criminal or not, the persons who are guilty of the tortious acts will be civilly liable to those whom they have injured. If the defendants have injured the plaintiff unlawfully, the articles of association cannot protect them, and it is immaterial whether persons who are not parties to the action are guilty.

The acts charged are alleged to have been done in pursuance of a conspiracy. On this point, if two or more persons combine to accomplish an unlawful purpose, or a purpose not unlawful by unlawful means, their conduct comes within the definition of a criminal conspiracy as stated in *Commonwealth v. Hunt*, cited above. If, in pursuance of such a conspiracy, they do an act injurious to any person, he may have an action against them to recover the damage they have done him.

One of the aims of the common law has always been to protect every person against the wrongful acts of every other person, whether committed alone or in combination with others; and it has provided an action for injuries done by disturbing a person in the enjoyment of any right or privilege which he has. Many illustrations of this doctrine are given in *Bac. Ab. Actions on the Case, F.*, among which are the following: "If A., being a mason, and using to sell stones, is possessed of a certain stone-pit, and B., intending to discredit it and deprive him of the profits of the said mine, imposes so great threats upon his workmen, and disturbs all comers, threatening to maim and vex them with suits if they buy any stones, so that some desist from working, and others from buying, A. shall have an action upon the case against B., for the profit of his mine is thereby impaired." So "if a man menaces my tenants-at-will of life and member, *per quod* they depart from their tenures, an action upon the case lies against him." "If a man discharges guns near my decoy-pond with design to damnify me by frightening away the wild-fowl resorting thereto,

¹ 4 Met. 111, 129.

and the wild-fowl are thereby frightened away, and I am damaged, an action on the case lies against him." Slander as to one's profession or title is a wrong of a similar character.

The illustrations given in former times relate to such methods of doing injury to others as were then practised, and to the kinds of remedy then existing. But as new methods of doing injury to others are invented in modern times, the same principles must be applied to them, in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges; and existing forms of remedy must be used. Thus in the recent case of *Marsh v. Billings*,¹ the plaintiff, being a hotel-keeper, had a badge on his coaches indicating the name of his hotel. The defendant adopted his badge, and used it fraudulently to entice customers away from his hotel, and was held liable to an action for the damage occasioned to the plaintiff thereby.

In the cases cited above, the injury was done by an individual; but there are other cases where an element of the tort is a conspiracy of two or more persons who combine together for the purpose of doing the wrong. Any person has a right to express in a reasonable manner approbation or disapprobation of an actor at a theatre. But if several persons combine together to ruin an actor, and hire persons to attend, and with hissing, groans, and yells, compel him to desist, and prevent the manager from employing him, such conduct is actionable. *Gregory v. Brunswick*.²

There are many cases where money has been wrongfully obtained by fraud, oppression, or taking undue advantage of another, without doing him any other injury. This, being tortious, would sustain an action expressly alleging the tort. But an action for money had and received has been maintained in many cases where money has been received tortiously without any color of contract.³ This class of cases is referred to, because they discuss the question what constitutes an unlawful obtaining of money, such as will subject the party obtaining it to an action for damages.

In *Shaw v. Woodcock*,⁴ it is said that, if a party making a payment is obliged to pay the money in order to obtain possession of things to which he is entitled, the payment is not a voluntary, but a compulsory payment, and may be recovered back.

In *Morgan v. Palmer*,⁵ ABBOTT, C. J., says that in order to render a payment voluntary in the proper sense of the word, the parties concerned must stand upon equal terms; there must be no duress operating upon the one; there must be no oppression or fraud practised by the other.

In *Cadaval v. Collins*,⁶ money was recovered back which was obtained by abuse of legal process.

In *Wakefield v. Newbon*,⁷ money extorted from another by means of the wrongful detention of his goods was recovered back.

¹ 7 Cush. 322.² 6 Man. & G. 205.³ 1 Chit. Pl. 6th Ed. 352.⁴ 7 B. & C. 73.⁵ 4 D. & R. 283.⁶ 4 A. & E. 858.⁷ 6 Q. B. 276.

The same doctrine is well established in this country. In *Sortwell v. Horton*,¹ the principle was stated to be, that money may be recovered back that had been paid in discharge of a claim which was fictitious and false, and known to be so by the party making the claim, and who induced the payment by menaces, duress or taking undue advantage of the other's situation. There are several cases where the action has been maintained to recover back money which was paid to procure a release of property which the defendant had detained illegally; and in some of them the principle is thoroughly discussed. *Chase v. Dwinal*;² *Harmony v. Bingham*;³ *Maxwell v. Griswold*;⁴ *Cobb v. Charter*.⁵ In *James v. Roberts*,⁶ the court enjoined a party from enforcing the collection of a note which he had induced the plaintiff to give by threats of a groundless prosecution. *Evans v. Huey*,⁷ was an action on a note. The plaintiff went to the defendant's house in the night, with a party of armed men, and insisted on the defendant's settling and giving him the note. There was no threat or duress, but the court held that, as the circumstances were sufficient to awaken his apprehensions, it was not to be regarded as a voluntary payment.

In the two cases last cited, the principle was enforced by protecting the injured party against a suit.

The cases in regard to the recovery back of money which has been wrongfully obtained are very numerous. Many of them are collected in the notes to *Marriot v. Hampton*.⁸ There is a large class of cases in which it cannot be recovered back, like *Marriot v. Hampton*, and like *Benson v. Monroe*.⁹ In the latter case, the defendant had made a claim in good faith, under a statute which he believed to be valid. The plaintiff had preferred to settle and pay it, rather than litigate the matter further. It turned out, by the decision in a subsequent case, that if he had carried the case to the Supreme Court of the United States he would have prevailed, on the ground that the statute was unconstitutional. But neither this, nor any of the other cases, gives any countenance to the idea that money can be obtained by fraud or oppression, and with knowledge that the claim is unfounded, without exposing the party obtaining it to an action.

Without undertaking to lay down a precise rule applicable to all cases, we think it clear that the principle which is established by all the authorities cited above, whether they are actions of tort for disturbing a man in the exercise of his rights and privileges, or to recover back money tortiously obtained, extends to a case like the present. We have no doubt that a conspiracy against a mechanic, who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him, which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his

¹ 28 Vt. 373.

² 7 Greenl. 131.

³ 2 Kernan, 99.

⁴ 16 How. 242.

⁵ 32 Conn. 358.

⁶ 18 Ohio, 548.

⁷ 1 Bay, 13.

⁸ 2 Smith's L. C. 6th Am. Ed. 453.

⁹ 7 Cush. 125.

employment, or by threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that the money thus obtained may be recovered back, and, if the parties succeed in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated.

This principle does not interfere with the freedom of business, but protects it. Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions. *Commonwealth v. Hunt*,¹ cited above; *Boston Glass Manufactory v. Binney*; ² *Bowen v. Matheson*.³

This freedom of labor and business has not always existed. When our ancestors came here, many branches of labor and business were hampered by legal restrictions created by English statutes; and it was a long time before the community fully understood the importance of freedom in this respect. Some of our early legislation is of this character. One of the colonial acts, entitled "An act against oppression," punished by fine and imprisonment such indisposed persons as may take the liberty to oppress and wrong their neighbors by taking excessive wages for their work, or unreasonable prices for merchandises or other necessary commodities as may pass from man to man.⁴ Another required artificers, or handiworkmen meet to labor, to work by the day for their neighbors, in mowing, reaping of corn, and the inning thereof.⁵ Another act regulated the price of bread.⁶ Some of our town records show that, under the power to make by-laws, the towns fixed the prices of labor, provisions, and several articles of merchandise, as late as the time of the Revolutionary War. But experience and increasing intelligence led to the abolition of all such restrictions, and to the establishment of freedom for all branches of labor and business; and all persons who have been born and educated here, and are obliged to begin life without property, know that freedom to choose their own occupation and to make their own contracts not only elevates their condition, but secures to skill and industry and economy their appropriate advantages.

Freedom is the policy of this country. But freedom does not imply a right in one person, either alone or in combination with others, to disturb

¹ 4 Met. 111.

² 4 Pick. 425.

³ 14 Allen. 499.

⁴ Anc. Chart. 172.

⁵ Anc. Chart. 210.

⁶ Anc. Chart. 752.

or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyance or injury, for the sake of compelling him to buy his peace; or, in the language of the statute cited above, "with intent to extort money or any pecuniary advantage whatever, or to compel him to do any act against his will." The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country; and if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both.

Exceptions sustained.

After this decision, the case was settled by the parties, without another trial.

JOHN B. SCHOLEY, EXECUTOR, ETC., APPELLANT, v. GEORGE H. MUMFORD, *et al.*, RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 20, 1875.

[*Reported in 60 New York Reports, 498.*]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, in favor of defendants, entered upon an order denying a motion for a new trial and directing judgment upon a verdict.

This action was brought to recover back moneys paid under the following circumstances:—

The plaintiff and George H. Mumford were executors of the will of Elizabeth Scholey. Mr. Mumford died having in his possession certain United States bonds, to the amount of \$85,000, belonging to the estate of Mrs. Scholey. These came to the hands of defendants, who were Mr. Mumford's executors. They refused to deliver up the same unless certain commissions, which they claimed due their testator, were paid; among them was a claim for commissions of one half of one per cent upon the value of the bonds. They filed in the surrogate's office the account of their testator, as executor. It was undisputed, save as to the said commissions. This was submitted to the surrogate, who decided adversely to the plaintiff, whereupon to obtain the bonds he paid the claim and received the bonds. No formal order was entered. Subsequently plaintiff applied for a rehearing. An order and citation were issued. The defendants appeared, and upon the rehearing the surrogate reversed his previous decision. The defendants refused to refund the moneys. The court directed a verdict for defendants. Exceptions were ordered to be heard, at first instance, at General Term.

Francis A. Macomber for the appellant.

G. F. Danforth for the respondents.

RAPALLO, J. That the sum paid by the plaintiff to the defendants was illegally demanded, and that they had no just right to it, is not denied. But they claim to retain it on the ground that the payment was voluntary; and they cite the elementary rule, "that, by submitting to the demand, he that pays the money gives it to whom he pays it, and makes it his, and closes the transaction between them."

The court, at the trial, sustained this claim of the defendants, and decided that, although the defendants were not entitled to the commissions claimed, yet, the payment thereof in the manner proved was a voluntary payment, and, therefore, the money could not be recovered; and, solely upon that ground, directed a verdict for the defendant.

Without passing upon the questions argued by the appellant, whether an executor can make a valid gift to a co-executor, or his representative, of funds belonging to the estate; or whether the payment in controversy was for fees illegally exacted, we are of opinion that the facts of the case clearly require us to hold that the payment was not voluntary.

The defendants had in their possession \$85,000 of bonds belonging to the estate of which the plaintiff was surviving executor. These bonds had come to the possession of the defendants through George H. Mumford, deceased, who was, in his life, the co-executor, with the plaintiff, of the will of Mrs. Scholey. The complaint alleges that the defendants refused to deliver these bonds to the plaintiff until the sum in controversy, which was alleged by the defendants to be due to the estate of George H. Mumford, deceased, for commissions, was paid to them, and that this claim was disputed by the plaintiff. The parties appeared before the surrogate, who, in the first instance, decided that the defendants were entitled to the commissions. The plaintiff then paid them, and afterward applied to the surrogate for a rehearing upon the question, and upon such rehearing the surrogate reversed his former decision. The complaint alleges that the plaintiff, although advised that the first decision of the surrogate was erroneous, nevertheless paid the sum claimed, in order to obtain the delivery of the bonds to him. The defendants, in their answer, do not deny the allegation of the complaint that they refused to deliver up the bonds except upon payment of the commissions, but, on the contrary, expressly admit "that they would not have delivered up the bonds except upon the terms aforesaid," *i. e.*, the payment of the commissions. The plaintiff testified that he was anxious to get the bonds; that the defendants had, after the death of George H. Mumford, declined to give up the bonds, on the ground that commissions were due. The evidence is very meagre; but I think it sufficiently appeared, from the acts of the parties and the admission in the answer, that this claim for commissions was disputed, and was yielded to simply as a means of obtaining possession of the bonds to which the plaintiff was entitled, and which the defendants withheld from him for the purpose of coercing payment of the commissions.

To constitute a voluntary payment the party paying must have had the freedom of exercising his will. When he acts under any species of compulsion the payment is not voluntary. If a party has in his possession goods, or other property, belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and, in order to obtain possession of his property, he pays that sum, the money so paid is a payment made by compulsion, and may be recovered back. (Per BAYLEY, J., *Shaw v. Woodecock*.¹) This has been frequently decided. Where a pawnbroker refused to deliver plate pawned, except upon payment of excessive interest, and the owner paid it to obtain his property, he was allowed to recover back the excess. *Ashley v. Reynolds*.² An action will lie to recover back money paid to release goods wrongfully detained on a claim of lien: *Ashmole v. Wainwright*; ³ *Harmony v. Bingham*; ⁴ or money wrongfully exacted by a corporation as a condition permitting a transfer of stock. *Bates v. N. Y. Ins. Co.*⁵ The cases to this effect are numerous. In all these cases the payment is regarded as compulsory, and not voluntary. I think the case at bar falls within the principle of these decisions. The amount of property was very large compared with the sum exacted; and, from the conduct of the plaintiff, it may well be inferred that he preferred to pay it and take the chances of recovering it back, rather than to incur the hazard of having so large an amount of property in the hands of the defendants.

The claim of the defendants, that after the surrogate had decided that the defendants were entitled to the commissions, the plaintiff gave up the controversy, and consented to abide by the decision, is not sustained by the facts. The uncontroverted allegations of the complaint, that the defendants refused to deliver the bonds unless the commissions were paid; and that, after the first decision of the surrogate, the plaintiff, although advised that the decision was erroneous, did, nevertheless, pay them, in order to have the bonds delivered up to him, coupled with the steps which were very soon afterward taken by the plaintiff to obtain a reversal of the decision of the surrogate; and the allegations in the answer, that, after the first decision, the defendants notified the plaintiff that they would deliver up the bonds on payment of the amount claimed by them, and that they would not have delivered up the bonds except upon the terms aforesaid, sufficiently define the positions of the parties, and show that the payment was not the free and voluntary act of the plaintiff; but that he had no choice, and was compelled to submit to the demand in order to obtain immediate possession of the bonds.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

All concur; except MILLER, J., dissenting.

Judgment reversed.

¹ 7 B. & C. 73.

² 2 Stra. 915.

³ 2 A. & E. N. s. 737.

⁴ 12 N. Y. 109, 116.

⁵ 3 Johns. Cas. 238.

THE OCEANIC STEAM NAVIGATION COMPANY v. J. NELSON
TAPPAN.IN THE CIRCUIT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW
YORK, MAY 6, 1879.*[Reported in 16 Blatchford, 296.]*

WALLACE, J. This action is brought to recover moneys alleged to have been illegally exacted by the defendant, the chamberlain of the city of New York, and to whom the plaintiff paid the sum involved, under protest. The moneys were collected by the defendant under color of the provisions of acts of the legislature of the State of New York, by which, in effect, a tax was imposed upon alien passengers arriving in vessels at the port of New York, to be collected of the master or owner of the ship by which they were landed. These acts, since the payment of the moneys in suit, have been declared unconstitutional by the Supreme Court of the United States, as in conflict with the clause of the Constitution of the United States which delegates to Congress the right to regulate commerce with foreign nations. *Henderson v. The Mayor*.¹ Since the payment of the moneys, however, Congress has passed an act,² which declares that the acts of every State and municipal officer or corporation of the several States, in the collection of these moneys, shall be valid, and that no action shall be maintained against such officer or corporation, for the recovery of such moneys. The defence of the action is placed upon two grounds, — first, that the moneys were paid voluntarily; and, second, that the validating act of Congress precludes a recovery by the plaintiff.

An action does not lie to recover back moneys claimed without right, if the payment was made voluntarily, and with a full knowledge of the facts upon which the claim was predicated. It is not enough that payment was made under protest by the party paying. The payment must have been compulsory; that is, it must have been made under coercion, actual or legal, in order to authorize the party paying to recover it back. In the absence of such coercion, the person of whom the payment is demanded must refuse the demand; and he will not be permitted, with knowledge that the claim is illegal and unwarranted, to make payment without resistance, where resistance is lawful and possible, and afterwards to select his own time to bring an action for restoration, when, possibly, his adversary has lost the evidence to sustain the claim. Where, however, the demandant is in a position to seize or detain the property of him against whom the claim is made, without a resort to judicial proceedings, in which the validity of the claim may be contested, and payment is made under protest, to

¹ 92 U. S. 259.² Act of June 19, 1878, 20 U. S. Stat. at Large, 177.

release the property from such seizure or detention, the party paying can recover back his payment.

The commutation moneys paid by the plaintiff were paid to relieve the plaintiff from an accumulation of penalties, the collection of which could only be enforced by judicial proceedings. The statute required the plaintiff, within twenty-four hours after the arrival of its vessel at the port of New York, to report in writing to the mayor of the city, the number, names, places of birth and last legal residence, of each alien passenger, and, in case of failure, imposed a penalty of seventy-five dollars for each passenger not reported. The statute also directed the mayor, by an indorsement to be made on such report, to require the owner of the vessel to execute a several bond, with sureties, in a penalty of \$300, for each passenger included in the report, to indemnify and save harmless the Commissioners of Emigration, and each and every city, town, or county in the State, against all expenses which might necessarily be incurred for the care and support of such passenger. The statute also enacted, that such owner might commute for the bonds so required, within three days after the landing of such passengers, by paying to the chamberlain of the city of New York the sum of one dollar and fifty cents for each and every passenger reported according to law, and that the receipt of such sum should be deemed a full and sufficient discharge from the requirements of giving bond. In case of neglect or refusal to give the bonds required, within twenty-four hours after landing passengers, the statute imposed a penalty upon the owner or consignee of the vessel, of five hundred dollars for each passenger landed.

The penalties given by the act were to be sued for and recovered by the Commissioners of Emigration, in any court having jurisdiction of such actions, and, under a general statute of the State respecting claims against vessels, such an action could be commenced by the seizure of the vessel by attachment, upon giving security to indemnify the owner. Briefly stated, the plaintiff's position was this: if it failed to report, it was liable to a penalty of seventy-five dollars for each alien passenger; if it did report, it was required to pay one dollar and fifty cents for each passenger, by way of commutation, or was liable, if required by the mayor, to give onerous bonds, and, in default, to pay a penalty of five hundred dollars for each bond withheld; and the penalties, in either case, were a lien upon the vessel, collectible by an action at law, wherein, upon giving security for the indemnity of the vessel owner, an attachment against the vessel might be obtained and the vessel seized.

Palpably, the statute was framed to coerce the payment of the commutation moneys. If they were not paid, the owner of the vessel was made liable to an accumulation of penalties, which would aggregate an enormous sum, and which, if collected, would ordinarily bankrupt the ship-owner. Naturally, rather than incur the hazard of such disastrous consequences,

the ship-owner would pay, in preference to abiding the contingencies of litigation. The hardship of the particular case, however, cannot change the rule of law. The penalties imposed in lieu of the commutation money could only be collected by suit in a court of law, where the corporation against which they were claimed could have its day and all the protection which the courts afford to suitors; and a payment made under such a state of facts is not made under legal coercion. The party paying is bound to know the law, and to assume that it will be correctly administered by the tribunal which is to decide the controversy. The rule is well stated in *Benson v. Monroe*,¹ which was a case to recover head money, under a statute similar to the one here, and was precisely like the present case, except that attachment had been obtained, and the vessel seized under them, to recover the penalties. The plaintiffs thereupon paid the commutation money under protest, and brought suit to recover it back; and the court said: "They should have contested the demand made on them, in the suit that was instituted against them, and, having voluntarily adjusted that demand, and relieved their vessel from seizure, with a full knowledge, or means of knowledge, of all the facts of their case, they cannot now be permitted to disturb that adjustment."

It is stated, in general terms, in some of the decisions, that, where money is paid to a public officer, upon an unlawful demand, to save the person paying from the infliction, under color of authority, of great or irreparable injury, from which he can only be saved by making the payment, such payment is made under an urgent and immediate necessity and may be recovered back. But, it will be found that none of these decisions were in cases where the injury apprehended by the party paying could only be inflicted by the decision of a court in favor of the validity of the claim made against him. There cannot be an immediate and urgent necessity for the payment of a demand which can only be enforced by the decision of a court of justice. The case of *Benson v. Monroe*, and that of *Cunningham v. Boston*,² are directly in point, as deciding, that the apprehension of the recovery of heavy penalties by suit, in case the demand for a small sum is not complied with, does not take the case out of the general rule.

The case of *Cunningham v. Monroe*,³ cited for the plaintiff, was one where the payment was made under circumstances amounting to duress *de facto*, which were emphasized, in the opinion of the court, as distinguishing it from *Cunningham v. Boston*. There are cases in the books, where payments have been extorted by threats of criminal or civil proceedings, and the party paying the demand has been permitted to recover back, but these were cases where the facts were held to constitute actual duress, of which the threats were an incident.

In reaching this conclusion I have not adverted to the fact, that the

¹ 7 Cush. 125.

² 16 Gray, 468.

³ 15 Gray, 471.

mayor never required the bonds to be executed by the plaintiff, by the indorsement upon the reports which the statute directs. The moneys were paid by the plaintiff to escape the penalties imposed for neglect to execute the bonds, and not the penalties for failing to make the report required by the act. Until the mayor's indorsement these penalties could not accrue. The plaintiff, without waiting to ascertain whether or not the mayor would take the action required to subject the plaintiff to the penalties, paid the commutation moneys, upon the assumption that the mayor would take such action at some future time. Within the recent decision of the Supreme Court of the United States in *Railroad Co. v. Commissioners*,¹ this circumstance should defeat the plaintiff. That case holds, that, where a warrant was in the hands of an officer, for the collection of a tax, which authorized him to seize the property of the plaintiff, and no actual attempt to execute the warrant had been made, but the plaintiff, assuming that a seizure would be made, went to the treasurer and paid the tax under protest, setting forth in the protest the illegality of the tax, and stating that a suit would be brought to recover back the payment, the payment was not compulsory, in a legal sense, and could not, therefore, be recovered back.

I have preferred, however, to rest the decision, upon this branch of the case, upon the broad ground, that money paid upon a demand, to prevent the seizure of property which can only take place by judicial proceedings, where the party paying may have his day in court and defeat the proceeding, is not paid under legal compulsion, and cannot be recovered back, although paid under protest. *Mayor of Baltimore v. Lefferman*; ² *Town Council of Cahaba v. Burnett*; ³ *Cook v. City of Boston*; ⁴ *Taylor v. Board of Health*; ⁵ *Mays v. Cincinnati*.⁶

Having thus reached a conclusion which must dispose of this case adversely to the plaintiff, it is not necessary to pass upon the question presented by the defence, which rests on the effect of the act of Congress declaring that the acts of the defendant in collecting the moneys in suit shall be valid, and declaring that no action shall be maintained to recover back the money. It would be indecorous to adjudge an act of Congress unconstitutional, when it is not necessary to do so in the disposition of the controversy before the court. It is proper, however, to say, that, to sustain the validity of this act, it will be necessary to decide that it is within the authority of Congress to legalize the action of officers of a State in collecting moneys under a law of the State, which, because it was unconstitutional, conferred no authority whatever to act under it; and I am not aware of any legislative validating act containing such a vigorous and radical measure of relief, which has been the subject of judicial exposition. Unless the act can be sustained as a validating act, it would seem that the

¹ 98 U. S. 541.

² 4 Gill, 425.

³ 34 Ala. 400.

⁴ 9 Allen, 393.

⁵ 31 Penn. St. 73.

⁶ 1 Ohio, St. 268.

clause which declares that no action shall be maintained to recover back the moneys collected, must be ineffectual, because it would deprive the plaintiff of a right of action, which is a vested right of property, without due process of law.

Judgment is ordered for the defendant.

Henry Nicoll, Ashbel Green, and James Emott for the plaintiff.

George P. Andrews, William C. Whitney, and Lewis Sanders for the defendant.

SWIFT COMPANY v. UNITED STATES.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 17, 1884.

[*Reported in 111 United States Reports, 22.*]

THIS case was heard at October term, 1881, on a demurrer to the petition. The judgment of the Court of Claims sustaining the demurrer was overruled, and the case remanded for a hearing on the merits, 105 U. S. 691. The Court of Claims found that the claimants from 1870 to 1878, were manufacturers of matches, furnished their own dies, and gave bonds for payment of stamps furnished within sixty days after delivery under the statute. Each order was for stamps of a stated value. The commissioner from the commencement held that the amount allowed by statute was to be computed as commissions upon the amount of money paid. All business between the parties was transacted and all accounts stated and adjusted by the accounting officers on that basis. The manner in which the parties did business under that ruling is stated below, in the opinion of the court. The Court of Claims held that the facts showed an acquiescence by the claimant in the construction of the statute by the commissioner, and such repeated settlements and voluntary acceptances of stamps in payment of their commissions in lieu of money, as to preclude them from recovering, and gave judgment in favor of the United States. From this judgment the corporation appealed. On the hearing in this court the argument was on the following points: 1st. Whether the former construction of the statute was correct; 2d. Whether the long acquiescence of the company in the construction given to the statute by the commissioner, and its frequent and regular settlement of its accounts on that basis and acceptance of stamps in lieu of money precluded it from disputing the legality of the transactions; and 3d. What was the effect of the failure to protest against the settlements which it made under the rulings of the commissioner.

Mr. J. W. Douglass and *Mr. Samuel Shellabarger* for appellant.

Mr. Solicitor-General for appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On a former appeal in this case a judgment of the Court of Claims dismissing the claimant's petition on demurrer was reversed. *Swift Company v. The United States*.¹

It was then held that the right construction of the internal revenue acts, act of July 1st, 1862, c. 119, § 102, 12 Stat. 477; act of March 3d, 1863, c. 74, 12 Stat. 714; act of June 30th, 1864, c. 173, 13 Stat. 294, 302; act of July 14th, 1870, c. 255, § 4, 16 Stat. 257, required the payment of the commission allowed to dealers in proprietary articles purchasing stamps made from their own dies and for their own use, to be made in money, calculated at the rate of ten per cent upon the whole amount of stamps furnished, and not in stamps at their face value calculated upon the amount of money paid. In response to a suggestion in argument by the solicitor-general we now repeat the conclusion then announced. We had no doubt upon the point at the time; we have none now. The distinction was then pointed out between the rule applicable to the sale of other adhesive stamps and those sold to proprietors of articles named in Schedule C, made from their own dies. In the former, the commissioner of internal revenue had a discretion to fix the rate of commission so as not to exceed five per cent, and in exercising that discretion could make the commission payable in stamps as an element in the rate itself. As to the latter, no such discretion was given. The statute fixed the rate of the commission absolutely. The practice of the bureau confused the two cases and ignored the distinction between them. We do not perceive how the substitution of the word "commission" in the act of 1863 for the word "discount" in the proviso to § 102 of the act of 1862 affects the question; for the latter obviously refers to a sum to be deducted from the money paid for the stamps, and not from the stamps sold, while the former equally denotes a sum to be paid to the purchaser on a purchase of stamps at par, both being calculated as a percentage upon the amount of the purchase-money, and the necessary implication as to both being that they are to be paid in money. However the words in some applications may differ in verbal meaning, they represent in the transactions contemplated by these statutes an identical thing.

The present appeal is from a decree rendered in favor of the United States, upon a finding of facts upon issue joined; and presents two questions: first, whether the course of dealing between the parties now precludes the appellant from insisting upon his statutory right to require payment of his commissions in money, instead of stamps; and second, whether, if not, part of his claim did not accrue more than six years before suit brought, so as to be barred by the statute of limitations.

On the former appeal we decided that the course of dealing set forth in the petition, which was admitted by the demurrer, did not bar the claimant's right to recover; holding that it did not appear on the face of the

¹ 105 U. S. 691.

petition that the appellant voluntarily accepted payment of his commissions in stamps at par, instead of money, nor that he was willing to waive his right to be paid in that way; and that "it would be incumbent on the government, in order to deprive him of his statutory right, not only to show facts from which an agreement to do so," that is, an agreement to waive his statutory right, "might be inferred, but an actual settlement based upon such an understanding."

The decree brought up by the present appeal proceeds upon the basis that the facts as found by the Court of Claims establish such an agreement and such a settlement.

The course of dealing found to exist and to justify this conclusion may be briefly but sufficiently stated to have been as follows: The appellant gave the bonds from time to time necessary under the statute to entitle it to sixty days' credit on its purchases of stamps. The condition of this bond was that the claimant should, on or before the tenth day of each month, make a statement of its account upon a form prescribed by the Internal Revenue Bureau, showing the balance due at the commencement of the month, the amount of stamps received, the amount of money remitted by it during the month, and the balance due from it at the close of the month next preceding; and also that the company should pay all sums of money it might owe the United States for stamps delivered or forwarded to it, according to its request or order, within the time prescribed for payment for the same according to law, that is, for each purchase within sixty days from the delivery of the stamps.

Each purchase was upon a separate written order, specifying the amount desired, for example, 3000 dollars' worth of match stamps. The commissioner thereupon forwarded stamps of the face value of \$3300, with a letter stating that they were in satisfaction of the order referred to, and inclosing a receipt on a blank form, but filled up, except date and signature, which was an acknowledgment of the receipt of the specified amount of stamps in satisfaction of the order. The receipt was signed by the claimant and returned. The claimant from time to time made remittances of money in authorized certificates of deposit, in sums to suit its convenience, for credit generally, and received in reply an acknowledgment stating that credit had accordingly been given on the books of the internal revenue office on account of adhesive stamps; for instance, by certificate of deposit, \$2500; commission at ten per cent, \$250; total, \$2750; and authorizing the claimant to take credit therefor on the prescribed form for the monthly account current. These accounts were made out by the claimant monthly on blank forms prescribed and furnished by the commissioner, in which the United States were debited with all items of money remitted and with commissions calculated on each remittance at ten per cent, and credited with balance from previous month and stamps received on order in the interval, and with the balance due the United States. This account was by a mem-

orandum at the foot stated to be correct, complete, and true, and signed by the claimant. These returns, with corresponding statements by the commissioner, were settled and adjusted by the accounting officers of the Treasury Department every quarter, and notice of the settlement given to the claimant. The remittances were so made that while not corresponding to any particular order for stamps, they nevertheless covered all stamps the orders for which had been given sixty days or more previously, so that the claimant was always indebted to the United States for all stamps received within the past sixty days, but not for any received more than sixty days previously.

It must be admitted that this course of dealing and periodical settlement between the parties, whether the accounts be regarded as running merely or stated, shows clearly enough that the business was conducted upon the basis, that the claimant was to receive his commissions in stamps at their par value, and not in money, and that this was asserted by the Internal Revenue Bureau, and accepted by the appellant.

But in estimating the legal effect of this conduct on the rights of the parties there are other circumstances to be considered.

It appears that prior to June 30th, 1866, the leading manufacturers of matches, among whom was William H. Swift, who, upon the organization of the claimant corporation in 1870, became one of its large stockholders and treasurer, made repeated protests to the officers of the Internal Revenue Bureau against its method of computing commissions for proprietary stamps sold to those who furnished their own dies and designs; although it did not appear that any one in behalf of the claimant corporation ever, after its organization, made any such protest or objection, or any claim on account thereof, until January 8th, 1879. On that date, the appellant caused a letter to be written to the commissioner asserting its claim for the amount afterwards sued for, as due on account of commissions on stamps purchased. To this, on January 16th, 1879, the commissioner replied, saying that the appellant had received all commissions upon stamps to which it was entitled, "provided the method of computing commissions which was inaugurated with the first issue of private-die proprietary stamps, and has been continued by each of my predecessors, is correct. I have heretofore decided to adhere to the long-established practice of the office in this regard, until there shall be some legislation or a judicial decision to change it." And the claim was therefore rejected.

From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law upon which it acted through its successive commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value, instead of in money; that it regulated all its forms, modes of business, receipts, accounts, and returns upon that interpretation of the law; that it refused on application, prior to 1866, and sub-

sequently, to modify its decision; that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and finally, that conformity to it on their part was made a condition, without which they would not be permitted to purchase stamps at all. This was in effect to say to the appellant, that unless it complied with the exaction, it should not continue its business; for it could not continue business without stamps, and it could not purchase stamps except upon the terms prescribed by the commissioner of internal revenue. The question is, whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*.

In *Close v. Phipps*,¹ which was a case of money paid in excess of what was due, in order to prevent a threatened sale of mortgaged property, TINDAL, C. J., said: "The interest of the plaintiff to prevent the sale, by submitting to the demand, was so great, that it may well be said the payment was made under what the law calls a species of duress." And in *Parker v. Great Western Railway Company*,² the wholesome principle was recognized that payments made to a common carrier to induce it to do what, by law, without them, it was bound to do, were not voluntary, and might be recovered back. Illegal interest, paid as a condition to redeem a pawn, was held in *Astley v. Reynolds*,³ to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities, in *Tutt v. Ide*;⁴ and in *Ogden v. Maxwell*,⁵ it was held that illegal fees exacted by a collector, though sanctioned by a long-continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary. And in *Maxwell v. Griswold*,⁶ it was said by this court: "Now it can hardly be meant, in this class of cases, that to make a payment involuntary, it should be by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of his property, except by submitting to the payment." To the same effect are the *American Steamship Company v. Young*;⁷ *Cunningham v. Monroe*;⁸

¹ 7 Man. & G. 586.

² 7 Man. & G. 253.

³ 2 Stra. 915.

⁴ 3 Blatchf. 249.

⁵ 3 Blatchf. 319.

⁶ 10 How. 242-256.

⁷ 89 Pa. St. 186.

⁸ 15 Gray, 471.

Carew v. Rutherford;¹ Preston v. Boston.² In Beckwith v. Frisbie,³ it was said: "To make the payment a voluntary one, the parties should stand upon an equal footing." If a person illegally claims a fee *colore officii*, the payment is not voluntary so as to preclude the party from recovering it back. Morgan v. Palmer.⁴ In Steele v. Williams,⁵ MARTIN, B., said: "If a statute prescribes certain fees for certain services, and a party assuming to act under it insists upon having more, the payment cannot be said to be voluntary." "The common principle," says Mr. Pollock,⁶ "is, that if a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice." Addison on Contracts, *1043; Alton v. Durant.⁷

No formal protest, made at the time, is, by statute, a condition to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted; and the protests spoken of in the findings of the Court of Claims as having been made prior to 1866 by manufacturers of matches and others requiring such stamps, are of no significance, except as a circumstance to show that the course of dealing prescribed by the commissioner had been deliberately adopted, had been made known to those interested, and would not be changed on further application, and that consequently the business was transacted upon that footing, because it was well known and perfectly understood that it could not be transacted upon any other. A rule of that character, deliberately adopted and made known, and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced. This principle was recognized and acted upon in United States v. Lee,⁸ where it was held that the officers of the law, having established and acted upon a rule that payment would be received only in a particular mode, contrary to law, dispensed with the necessity of an offer to pay in any other mode, and the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary by law to secure his right.

For these reasons we are of opinion, that the Court of Claims erred in rendering its judgment dismissing the appellant's petition, and thus disallowing his entire claim. But we are also of opinion that he is not entitled to recover for so much of it as accrued more than six years before the bringing of his suit. There was nothing in the nature of the business, nor in the mode in which it was conducted, nor in the accounts it required, that prevented a suit from being brought for the amount of commissions withheld, in each instance as it occurred and was ascertained. The recovery

¹ 106 Mass. 1.

² 12 Pick. 7.

³ 32 Vt. 559-566.

⁴ 2 B. & C. 729.

⁵ 8 Ex. 625.

⁶ Principles of Contract, 523.

⁷ 2 Strobl. 257.

⁸ 106 U. S. 196-200.

must therefore be limited to the amount accruing during the six years next preceding November 21st, 1878, which, according to the findings of the Court of Claims, is \$28,616, and for that amount judgment should have been rendered by the court in favor of the appellant.

The judgment of the Court of Claims is reversed and the cause remanded, with directions to render judgment in favor of the appellant in accordance with this opinion.

CHAPTER VI.

WAIVER OF TORT.

TOTTENHAM & BEDINGFIELD'S CASE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1573.

[*Reported in 2 Leonard, 24.*]

IN an accompt by Tottenham against Bedingfield, who pleaded, that he never was his bailiff to render accompt, the case was, that the plaintiff was possessed of a parsonage for term of years, and the defendant not having any interest nor claiming any title in them, took the tythes being set forth and severed from the nine parts, and carried them away and sold them. Upon which, the plaintiff brought an action of accompt: and by MAXWOOD, Justice, the action doth not lie, for here is not any privity; for wrongs are always done without privity. And yet I do agree, that if one doth receive my rents, I may implead him in a writ of accompt, and then by the bringing of my action there is privity; and although he hath received my rent, yet he hath not done any wrong to me, for that it is not my money until it be paid unto me, or unto another for my use, and by my commandment; and therefore notwithstanding such his receipt, I may resort to the tenant of the land, who ought to pay unto me the said rent, and compel him to pay it to me again; and so in such case, where no wrong is done unto me, I may make a privity by my consent to have a writ of accompt; but if one disseiseth me of my land, and taketh the profits thereof, upon that no action of accompt lieth; for it is merely a wrong. And in the principal case, so soon as the tythes were severed by the parishioners, there they were presently in the plaintiff, and therefore the defendant by the taking of them was a wrong-doer, and no action of accompt for the same lieth against him. And upon the like reason was the case of Monox of London lately adjudged; which was, that one devised land to another, and died; and the devisee entered, and held the land devised for the space of twenty years; and afterwards for a certain cause the devise was adjudged void, and for that he to whom the land descended brought an action of accompt against the devisee; and it was adjudged that the action did not lie. HARPER, contrary: for here the plaintiff may charge the defendant as his proctor, and it shall be no plea for the defendant to say, that he was not his proctor, no more than in an accompt against one who holdeth as guardian in socage, it is no plea for him to say that he is not *prochein amy* to the plaintiff.

DYER, the action doth not lie. If an accompt be brought against one as receiver, he ought to be charged with the receipt of the money; and an accompt doth not lie where the party pretends to be owner, as against an abater or disseisor; but if one claimeth as bailiff, he shall be charged, and so it is of guardian in socage. And it was agreed that if a disseisor assign another to receive the rents, that the disseisee cannot have an accompt against such a receiver.

ARRIS & ARRIS v. STUKELY.

IN THE EXCHEQUER, TRINITY TERM, 1678.

[Reported in 2 Modern Reports, 260.]

SECOND POINT.¹ *Pollexfen* for the defendant. A general *indebitatus assumpsit* will not lie here for want of a privity,² and because there is no contract. It is only a tort, a disseisin, and the plaintiff might have brought an assise for this office, which lies at the common law; and so it hath been adjudged in *Jehu Webb's case*,³ which is also given by the statute of Westminster,⁴ for a profit *a prendre in alieno solo*. The plaintiff might have brought an action on the case against the defendant for disturbing of him in his office; and that had been good, because it had been grounded on the wrong. In this case the defendant takes the profits against the will of the plaintiff, and so there is no contract; but if he had received them by the consent of the plaintiff, yet this action would not lie for want of privity. It is true, in the case of *The King*, where his rents are wrongfully received, the party may be charged to give an account as bailiff; so also may the executors of his accountant, because the law creates a privity; but it is otherwise in the case of a common person,⁵ because in all actions of debt there must be a contract, or *quasi ex contractu*; and therefore where judgment was had, and thereupon an *elegit*, and the sheriff returned that he had appraised the goods, and extended such lands, which he delivered to the plaintiff, *ubi revera* he did not, *per quod actio accrevit*, which was an action of debt, it was adjudged that it would not lie, because the sheriff had not returned that he meddled with the goods, or with the value of them; and therefore for want of certainty how much to charge him with, this action would not lie, but an action on the case for a false return; but if he had returned the goods sold for so much money certain which he had delivered, then an action of debt would lie; for though it is not a contract, it is *quasi ex contractu*.⁶

¹ Only so much of the case is given as relates to this point. — ED.

² 2 Hen. 4 pl. 12; Bro. "Account," 24, 65, 89; Co. Lit. 212.

³ 8 Co. 4.

⁴ 2, Cap. 25.

⁵ 10 Co. 114 b; 11 Co. 90. b.

⁶ Hob. 206.

Winnington, Solicitor-General, and *Sawyer*, *contra*, said, that an *indebitatus assumpsit* would lie here; for where one receives my rent, I may charge him as bailiff or receiver; or if any one receive my money without my order, though it is a tort yet an *indebitatus* will lie, because by reason of the money the law creates a promise; and the action is not grounded on the tort, but on the receipt of the profits in this case.

The Court. An *indebitatus assumpsit* will lie for rent received by one who pretends a title; for in such case an account will lie. Wherever the plaintiff may have an account, an *indebitatus* will lie.

And in the Michaelmas term following, the court gave judgment for the plaintiff.¹

HASSER v. WALLIS.

IN THE KING'S BENCH, HILARY TERM, 1708.

[Reported in 1 Salkeld, 28.]

THE plaintiff being a feme sole married the defendant Wallis, who was in truth married to another woman; Wallis made a lease of the wife's land, reserving rent, and received the rents from the tenants. Upon this the plaintiff, discovering the former marriage, brought an *indebitatus assumpsit* against Wallis for so much money received to her use. And after verdict on *non assumpsit*, it was objected, that Wallis having no right to receive, the tenant was not discharged, and therefore an action lay against the tenant, who has his remedy over against Wallis. But the court held Wallis was visibly a husband, and the tenant discharged; at least that the recovery against Wallis in this action would discharge the tenant, for this would be a satisfaction to the lessor.

HITCHIN [OR KITCHEN] v. CAMPBELL.

IN THE COMMON PLEAS, TRINITY TERM, 1772.

[Reported in 2 William Blackstone, 827.]

THIS cause proceeded to trial in the sittings after Trinity term, 1771, on the two issues joined on the first and third pleas, when this special case was stated for the opinion of the court: That Richard Anderson, being indebted to the defendant Campbell in 2000*l.* for money lent, gave two bonds and

¹ It was held in *Boyter v. Dodsworth*, 6 T. R. 681, that an action would not lie to recover gratuities received by one tortiously discharging the duties of an office. — ED.

² Reported also in 3 Wils. 304. — ED.

judgment for the same; which judgment was entered up. And on the 9th March, 1769, a writ of execution was sued out and delivered to the sheriff of Surrey the same day, by virtue of which the sheriff the same day levied of the goods of Anderson by making a bill of sale thereof to the defendant, to the value of 2155*l.* 6*s.* 5*d.*, for debt and costs. On the 9th April, 1769, a commission of bankrupt was awarded against Anderson, and the plaintiff appointed assignee, who in Michaelmas term, 1769, brought trover in this court against the sheriff of Surrey and the defendant for the goods levied under the execution. On trial whereof in Hilary term, 1770, there was found a verdict for the defendant, and judgment accordingly. In Easter term, 1770, the plaintiff brought an action in the King's Bench against the defendant for money had and received to [his] use as assignee, and recovered 860*l.* 10*s.*, as mentioned in the plea, upon a different cause of action from the present; namely, for certain notes delivered to the defendant after the act of bankruptcy, which was proved in the present cause to have been committed in February, 1769. It was admitted that the defendant received the money levied under the execution before the action in the King's Bench was brought. And this action being brought to recover back that money, *Qu.* whether under these circumstances they are entitled to recover!

This case was argued in last Hilary term by *Glyn* for the plaintiff, and *Jephson* for the defendant; and again in Easter term, by *Davy* for the plaintiff, and *Burland* for the defendant.

For the defendant it was insisted, 1. That this action of assumpsit would not lie, the cause of action being in the nature of a tort, and not a contract. 2. That the plaintiff, having made his election by bringing trover in the King's Bench, in which he failed, is barred thereby from bringing another suit for the same cause of action.

For the plaintiff it was replied, 1. That general use and modern resolutions have now settled this point, and it is not to be disturbed. 2. That the plaintiff, not having had the fruit of his remedy in the King's Bench, shall not be precluded by it.

And now, in this term, DE GREY, C. J., delivered the opinion of himself, GOULD, BLACKSTONE, and NARES, JJ. The legal effect of an act of bankruptcy committed by a trader is to put it in the power of the commissioners, by relation, to divest the property of the bankrupt from that time, in case a commission be afterwards issued. This relation takes place in every instance but three, excepted by statutes 1 Jac. 1, 21 Jac. 1, and 19 Geo. 2.¹ Executions are not among these excepted cases, but are expressly declared void by the statute 21 Jac. 1; the commission being in the nature of an execution for the whole body of the creditors. By the old acts of Hen. 8 and Eliz., commissioners had a power of acting themselves in recovering the bankrupt's effects. Afterwards it became the practice to assign, which is allowed by 1 Jac. 1, c. 15. It was not till the 5 Anne

¹ C. 32.

that assignees were directed to be chosen, which was revived by 5 Geo. 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no trespasser by taking the goods in execution after the act of bankruptcy, and before the commission issued. So ruled in *Letchmere v. Thorowgood*, in Comb. and Show.;¹ and in *Cooper v. Chitty*, in Burrow, 20. But by selling, the sheriff converts the goods; and then trover is maintainable against the sheriff, or his vendee, or the plaintiff in the original action. But a question was made in this cause, whether *indebitatus assumpsit* would lie against the defendant for the money arising from the goods thus taken in execution, seeing that if the debt was illegally levied it was a tort, and if the tort be waived the whole is waived; for you cannot affirm one part of a transaction and disaffirm the rest.² It is true, this matter was considered formerly in that light, as in *Philips v. Tompson*,³ and *Holt*, 95, 12 Mod. 324. And in *Billon v. Hyde* (well reported, 1 Ves. 326),⁴ Lord HARDWICKE said that this action was never allowed by Lord PARKER, Lord RAYMOND, or himself, but that the practice had been since altered. And practice has certainly much extended this action of assumpsit as a very useful and general remedy. The same principle which supports this action against one who receives money from the bankrupt

¹ Comb. 123; 1 Show. 12; 3 Mod. 236.

² *Wilson v. Poulter*, 2 Stra. 859.

³ 3 Lev. 191.

⁴ "It is quite new to me that assignees under a commission of bankruptcy should maintain an *indebitatus assumpsit* (which is an action founded on contract) for money *bona fide* paid by the bankrupt after a secret act of bankruptcy to another person for valuable consideration. How long that is in practice I know not. I thought they were obliged to bring an action of trespass or trover for the tort, otherwise they would be nonsuited; of which opinion were Chief Justice PARKER, and Lord RAYMOND. And for that purpose I have a manuscript case at Guildhall, the sittings after T. T. 4 G. 1. It was an assumpsit by an administrator for money had and received, etc., and *non assumpsit* pleaded. The case was, the defendant was nurse to the intestate during his sickness, and being alone in the house when she died, conveyed away money and everything portable. The defendant objected the action would not lie, there being no color of contract, but a wrongful taking or conversion, for which trover lay. But PARKER, C. J., held the action maintainable; because, though the taking was wrongful, yet the plaintiff might agree afterward and make it right, and the bringing this action was an implied agreement; and that there were only two cases wherein an action for money had and received, etc., could not be brought; namely, for money won at play, and money paid after a bankruptcy; in both cases, unless you insist on the tort, the tort is waived. He went upon this: that you cannot affirm part and disaffirm part; so that the plaintiff there might bring trover or trespass for the tort, or an action for money had, etc., which the court laid down clear and without doubt, admitting two cases in which that action could not be brought for wrongful taking. In the case of money won at play, the action must be on the tort, not for money had, etc., that admitting the contract at play. So I have ruled at Guildhall, and I believe nonsuited a plaintiff when he has gone contrary. The judges perhaps have gone further since, and admitted such action rather than put the party to trover; and this action for money, etc., has been extended to advance the remedy of the party." Lord HARDWICKE, C., in *Billon v. Hyde*, 1 Ves. 329, 330. — Ed.

himself will support it against another who receives it under the bankrupt. In both cases it is the property of the assignees; and though while this action was in its infancy¹ the courts endeavored to find technical arguments to support it, as by a notion of privity, etc., yet that principle is too narrow to support these actions in general to the extent in which they are admitted. Besides, if it were necessary, there is in this case a privity between the defendant and the bankrupt, the judgment being voluntarily given. Another, and a much stronger objection taken, was that though the assignees may have their election to bring either an action of tort or contract, yet they cannot bring both; and having elected to bring trover, the judgment in that bars the action of assumpsit.² This depends upon two considerations: 1. Whether a man's having once elected to proceed upon the tort bars him from proceeding upon the contract. 2. Whether his proceeding down to judgment does not bar him from trying the same cause of action again. 1. As to the first, cases have been cited to show that where there are two different kinds of remedies, real and personal, or otherwise specifically distinguished, a man's election of one prevents him from using the other. He may distrain, or bring assize, but not both;³ may bring writ of annuity, or distrain;⁴ and his election is determined, even though he should not recover after he hath counted thereon.⁵ But where both remedies are merely real or merely personal, there the election is not determined till the judgment on the merits. For a nonsuit on an action of account is no bar to an action of debt.⁶ And so must HOLT, in 12 Mod. 324, be understood to mean, "that if they bring one they shall not afterwards bring the other." *i. e.*, if the first be brought to a due conclusion. 2. But in the present case the action of trover went on to a verdict and judgment, and appears by the case stated to have been for the same cause of action. And upon this it is that the opinion of the court is founded. The rule of law is, *Nemo debet bis vexari pro eadem causa.* And in Ferrers' case⁷ it is held that where one is barred in any action, real or personal, by judgment or demurrer, confession, verdict, etc., he is barred as to that, or the like action of the like nature for the same thing, forever. In personal actions the bar is universal; upon real actions he may have an action of a higher nature. But a bar in one assize, etc., is a bar in every other. Here, by "actions of the like nature" must be meant actions in a similar degree, not merely those which have a similitude of form. All personal actions are of the same degree; therefore each is a perpetual bar.

¹ 2 Jon. 126; 2 Lev. 245.

² In *Morris v. Robinson*, 2 B. & C. 196, it was held that an unsuccessful attempt to obtain the purchase-money of an unauthorized sale from one to whom the vendee had paid it, would not prevent an action against the vendee. *Aliter*, if a portion thereof had been received. *Lythgoe v. Vernon*, 5 H. & N. 180. — Ed.

³ Litt. s. 588.

⁴ Litt. s. 219.

⁵ Co. Litt. 145 a.

⁶ Co. Litt. 146 a.

⁷ 6 Co. 7; Cro. Eliz. 668.

5 Co. 61, Sparry's case, gives the history of this rule, and shows when it commenced, its progress, and legal distinctions. There are many exceptions to this rule: as, where the first action is not competent; where the plaintiff has mistaken his character, and sued as executor, not as administrator; or where the judgment is given for faults in the declaration or pleadings.¹ But the principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict or a special case. One great criterion of this identity is, that the same evidence will maintain both the actions. *Putt v. Royston*; ² *Mortimer v. Wingate*; ³ *Bro. Action on the Case*.⁴ These relate to the whole of the demand. But the same reasoning extends to part of it only; as 4 Co. 92 *b*, *Slade's Case*; and *Pike v. Aldworth*, in *Seacch.*, T. 5 W. & M., and Hil. 7 & 8 W. 3. In the present case, as there was clearly a conversion before the action of trover, the only question could be on the property. In this second action of assumpsit there arises the same question of property. The first action has determined the goods not to be the assignee's. He shall not now try whether the money produced by those goods is his or no. On the state of the case therefore now found, the court think the former action a bar.

When this case was first before the court on demurrer, there were not sufficient averments to support the plea in bar. Though the goods were averred to be the same, it did not appear that the question was the same; and therefore trover might not have lain for the goods themselves, though *indebitatus assumpsit* might afterwards lie for the value. Nor is there any injustice in the present case. The money is in the hands of a *bona fide* creditor, who has got an advantage at law, by his diligence, over the body of the creditors; and he has a right, in conscience, to keep it.

Therefore, *per tot. cur.*,

Judgment for the defendant.

CLARKE v. SHEE AND JOHNSON.

IN THE KING'S BENCH, NOVEMBER 22, 1774.

[*Reported in Cooper*, 197.]

THIS was an action of trespass on the case, wherein the plaintiff declared that the defendants, on the 1st of June, 1773, at London, etc., were indebted to the plaintiff in the sum of 1000*l*. for divers sums of money to the defendants, by the plaintiff, at the special instance and request of the defendants, before that time lent and advanced. There were two other counts for money laid out and expended, and for money had and received by the defendants to the plaintiff's use.

¹ 1 Mod. 207.

² 2 Show. 211; Raym. 472; 3 Mod. 1; Pollexfen, 634.

³ Moor, 463.

⁴ pp. 97, 105.

To this declaration the defendants pleaded the general issue, and thereupon issue was joined.

This case came on to be tried at the sittings after Trinity term, 1774, at Guildhall, London, before Lord MANSFIELD; when a verdict was found for the plaintiff, damages 45*l.* 4*s.* 4*d.* and costs 40*s.* subject to the opinion of the court upon the following case:—

That David Wood, being a clerk to the plaintiff, a brewer, and receiving money from the plaintiff's customers, and also negotiable notes for the plaintiff's use in the ordinary course of business, paid several sums with the said money and notes at different times, to the amount of 45*l.* 4*s.* 4*d.*, to the defendants upon the chances of the coming up of tickets in the State Lottery of 1772, contrary to the lottery act of the said year 1772.

The plaintiff and the said Wood's sureties have released him.

The question was, Whether the said Wood ought to have been admitted as a witness to prove the above case, and supposing his evidence admissible, whether the plaintiff is entitled to recover in this action.

Mr. *Davenport* for the plaintiff.

Mr. *Buller*, *contra*, for the defendants.

Lord MANSFIELD, after stating the case. As to the first question there can be no doubt but that Wood was an admissible witness. In *Bush v. Rawlins*, in debt upon the Stat. 2 Geo. 2, c. 24. against bribery, a man who had taken the bribery oath was held a competent witness, to prove that he himself had been bribed.

The next question is, Whether the plaintiff can maintain this action? This is a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action.

There are two sorts of prohibitions enacted by positive law, in respect of contracts. 1. To protect weak or necessitous men from being overreached, defrauded, or oppressed. There the rule *in pari delicto potior est conditio defendentis*, does not hold; and an action will lie; because where the defendant imposes upon the plaintiff it is not *par delictum*.

The case of *Tomkins v. Barnett* has been long exploded. In *Bosanquett v. Dashwood*, Lord HARDWICKE and Lord TALBOT both declared their disapprobation of it: for in that case there was not *par delictum*. In the case of money given by a bankrupt or his relations to a creditor, to sign the certificate, the transaction is against the express prohibition of the act of Parliament, and both are parties to it, but not equally guilty; for the bankrupt is an oppressed party; and therefore the action will lie.

The next sort of prohibition is founded upon general reasons of policy and public expedience. There both parties offending are equally guilty; *par est delictum, et potior est conditio defendentis*. The prohibition in the lottery act, Stat. 12 Geo. 3, c. 63, is of this sort; and in this case no doubt

but the defendants and the witness Wood were equally guilty. Therefore at Guildhall, upon the first impression, I was of opinion against the plaintiff; because I thought that the master could not stand in a better situation than the servant, and the servant was clearly *particeps criminis*. But I changed my opinion; I thought, and now think, the plaintiff does not sue as standing in the place of Wood, his clerk: for the money and notes which Wood paid to the defendants are the identical notes and money of the plaintiff. Where money or notes are paid *bona fide*, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover. It is of public benefit and example that he should; but otherwise, if they cannot be followed and identified, because there it might be inconvenient and open a door to fraud. *Miller v. Race*; ¹ and in *Golightly v. Reynolds*, the identity was traced through different hands and shops. Here the plaintiff sues for his identified property, which has come to the hands of the defendants iniquitously and illegally, in breach of the act of Parliament. Therefore they have no right to retain it, and consequently the plaintiff is well entitled to recover.

The three other judges concurred.

Judgment for the plaintiff.

BRISTOW *et al.*, ASSIGNEES OF CLARK & GILSON, BANKRUPTS, v. EASTMAN.

AT NISI PRIUS, BEFORE LORD KENYON, C. J., JULY 18, 1794.

[*Reported in 1 Espinasse, 172.*]

ASSUMPSIT for money had and received to the use of the plaintiffs, with the usual money counts.

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The case as it appeared in evidence was, that the defendant had been apprentice to the bankrupts before their bankruptcy; that his principal employment while he was in their service had been in passing the ships engaged in their trade at the Custom House, in making payments and receiving money in that employment; but that in making out his returns to them of the monies expended on that account, he had made many very considerable overcharges, by which he had defrauded them of a very considerable sum of money; to recover back which was the object of the present action.

Mingay for the defendant, rested his defence upon two points, the first was, that during the time that he had been so employed by the bankrupts, that

¹ 1 Burr. 452.

he was an infant, and that, therefore, an action for money had and received, which was founded on a contract, could not be maintained against him.¹

Upon the first point Lord KENYON said, That he was of opinion, that infancy was no defence to the action; that infants were liable to actions *ex delicto*, though not *ex contractu*, and though the present action was in its form an action of the latter description, yet it was of the former in point of substance; that if the assignees had brought an action of trover for any part of the property embezzled, or an action grounded on the fraud, that unquestionably infancy would have been no defence, and as the object of the present action was precisely the same, that his opinion was that the same rule of law should apply, and that infancy was no bar to the action.

The plaintiff had a verdict.

Garrow and *Lambe* for the plaintiff.

Mingay and *Marryat* for the defendant.

LIGHTLY v. CLOUSTON.

IN THE COMMON PLEAS, JANUARY 29, 1808.

[Reported in 1 Taunton, 112.]

THIS was an action of *indebitatus assumpsit* "for work and labor performed for the defendant at his request, by one Thomas Sinclair, the apprentice of the plaintiff legally bound to him by indenture for a term of years, at the time of the work and labor so performed existing and unexpired, and to the profits and receipts of whose work and labor, the plaintiff was, as the master of the said apprentice, by law entitled." The defendant seduced the apprentice from on board the plaintiff's ship in Jamaica, and employed him as a mariner to assist in navigating his own ship from Port Royal, home. The cause was tried at the sittings after Trinity term last, before MAXFIELD, C. J. The jury found a verdict for the plaintiff, subject to the opinion of the court on the following objection, namely, that the plaintiff ought to have declared in a special action on the case, and that *indebitatus assumpsit* would not lie.

Accordingly *Best*, Serjt., having on a former day obtained a rule *nisi* for setting aside the verdict and entering a nonsuit,

Shepherd, Serjt., now showed cause. It has been decided that this declaration is good, in the case of *Eades v. Vandeput*,² which was an action brought expressly for the wages earned by the plaintiff's apprentice, who had been improperly impressed, and compelled to serve on board a ship of war: and the court there held that the plaintiff might recover. *Barber v. Dennis*.³

¹ Only so much of the case is given as relates to this point. — Ed.

² 5 East, 39.

³ 1 Salk. 68.

but as may also appear the fact is that the court in this case held that the plaintiff was entitled to recover for the wages of his apprentice.

The widow of a waterman was held to be entitled to two tickets which had been earned by her apprentice during his service at sea. In *Smith v. Hodson*,¹ the court expressly determined, that although trover would have lain for the goods, yet the assignees might affirm the fraudulent contract of the bankrupt, and recover the price as upon a sale made by themselves.

Best, Serjt., contra. The case of *Eades v. Vandeput*, as it is now stated, cannot be law. An action might perhaps have been maintained in that case to recover the wages in the shape of damages for the tort; but all the work and labor which the apprentice there did must have been done for the king; since even the services of such servants as are allowed to the captain of a king's ship are wholly gratuitous to him. And if the apprentice worked for the king, that action could not be maintained against the captain. *Macheath v. Haldimand*.² *Barber v. Dennis* was a case of trover, which can furnish no authority for this form of action, and it is of the less weight because one point which is there reported cannot be law, namely, that it is immaterial whether the person who performed the service was legally an apprentice or not. The analogy drawn from that class of cases, in which goods have been tortiously taken and sold, and the plaintiffs have been permitted to waive the trespass and sue for the proceeds of the sale, as money had and received to their use, is not applicable here. It is of pernicious tendency more largely to extend this form of action, in which the defendant is not apprised by the declaration of the nature of the claim that is made on him. It is necessary to preserve the distinction between causes of action which arise *ex delicto*, and those which arise *ex contractu*, or there would be no limits to the perversion that would ensue. A cause was tried before EYRE, C. J., in which the plaintiff declared in assumpsit, that the defendant undertook not to beat him in a voyage to the East Indies. EYRE, C. J., held he could not recover.

MANSFIELD, C. J. It is difficult upon principle to distinguish this case from those that have arisen on bankruptcies and executions, and in which it has been held that trover may be converted into an action for money had and received, to recover the sum produced by the sale of the goods. I should much doubt the case of *Smith v. Hodson*, but that I remember a case so long back as the time of Lord Chief Justice EYRE in the reign of George the Second, in which the same thing was held. I should have thought it better for the law to have kept its course; but it has now been long settled, that in cases of sale, if the plaintiff chooses to sue for the produce of that sale, he may do it; and the practice is beneficial to the defendant, because a jury may give in damages for the tort a much greater sum than the value of the goods. In the present case the defendant wrongfully acquires the labor of the apprentice; and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort, and may say that he is entitled to the labor of his apprentice; that he is

¹ 4 T. R. 217.

² 1 T. R. 172.

consequently entitled to an equivalent for that labor, which has been bestowed in the service of the defendant. It is not competent for the defendant to answer, that he obtained that labor, not by contract with the master, but by wrong; and that, therefore, he will not pay for it. This case approaches as nearly as possible to the case where goods are sold, and the money has found its way into the pocket of the defendant.

HEATH, J. So long back as the time of Charles the Second, it was held that the title to an office, under an adverse possession, might be tried in an action for the fees of the office had and received; and HOLT, C. J., held it clear law, that if a person goes and receives my rents from my tenants, I may bring my action against him for money had and received. It is for the benefit of the defendant that this form of action should be allowed to prevail, for it admits of a set-off, and deductions, which could not be allowed in an action framed on the tort.

Rule discharged.

HILL v. PERROTT.

IN THE COMMON PLEAS, NOVEMBER 9, 1810.

[*Reported in 3 Taunton, 274.*]

BEST, Serjt., moved to set aside the verdict which had been found in this cause for the plaintiff, at the sittings after the last Trinity term before MANSFIELD, C. J., in London, and to enter a nonsuit. The action was for goods sold: there were special counts upon a contract of the defendant to pay for goods to be delivered at his request to Jean Meers Dacosta; but the evidence being of a contract to pay for goods to be delivered to Isaac Mendez Dacosta, those counts failed the plaintiff. The evidence was, that goods to a considerable amount were looked out to be delivered to Dacosta, for which the defendant undertook to accept a bill at six months to be indorsed by Dacosta. The goods were delivered to Dacosta, and afterwards were found in the defendant's possession: the whole was a swindling transaction, in which Dacosta was a mere instrument. Dacosta was insolvent, and the defendant, having become a guarantee for him, assisted him to buy these goods, which were, the moment after, made over to himself for his own indemnity. The only count that would serve the plaintiff was *indebitatus assumpsit* for goods sold, upon which he obtained a verdict.

Best, Serjt., on this day moved to set aside the verdict and enter a nonsuit. Whatever difficulty he might have in defending his client at another bar, there was no contract of sale, he said, between him and the plaintiff.

The court held, that the law would imply a contract to pay for the goods, from the circumstance of their having been the plaintiff's property, and having come to the defendant's possession, if unaccounted for; and he

could not be permitted to account for the possession by setting up the sale to Dacosta, which he had himself procured by the most nefarious fraud, because no man must take advantage of his own fraud; therefore *indubitatus assumpsit* lay for the goods, and the verdict could be supported, and they
Refused the rule.

FOSTER v. STEWART.

IN THE KING'S BENCH, NOVEMBER 15, 1814.

[Reported in 3 Maule & Selwyn, 191.]

ASSUMPSIT for work and labor by the plaintiff and his servants, and the money counts. Plea, *non assumpsit*. At the trial before Lord ELLENBOROUGH, C. J., at the London sittings after last Michaelmas term the plaintiff was nonsuited, with leave to move to enter a verdict in his favor, with 12*l.* damages, if the court should think the action maintainable in that form. And upon a rule *nisi* obtained for that purpose, the court, on showing cause, directed a case to be stated, the material facts of which are as follows:—

The plaintiff, a ship-owner in London, by indenture of the 2d of December, 1811, took one S. Plumptre to be his apprentice for six years, and sent him on board his (the plaintiff's) ship on a foreign voyage. The defendant is master of the ship "Guildford" of Shields, and in August, 1812, whilst his and the plaintiff's ships were lying at St John's, New Brunswick, Plumptre having, as he said, been ill treated by the master of the plaintiff's ship, absconded, and went on board the defendant's ship, where he secreted himself without the defendant's knowledge for two days, and until after the defendant had weighed anchor to sail from that place. When they had got about a mile from the land Plumptre discovered himself to the defendant, and told him who he was, and from what ship he had deserted. After this, the two ships in the course of their passage to Halifax were once or twice within hail of each other, but the defendant did not communicate to the master of the plaintiff's ship, that he had Plumptre on board. The defendant carried him in his ship to Halifax, to which he worked his passage, and for which he received his food. On the arrival of the defendant's ship at Halifax, Plumptre wished to leave her, but the defendant persuaded him to continue on board, and told him he would either give him wages or supply him with clothes and pocket-money. At this time the defendant's ship was but thinly manned; and by this persuasion Plumptre sailed in her to England, and arrived at Grimsby, and from thence sailed to Shields, where he was discharged, and immediately returned to London and surrendered himself to the plaintiff. During the whole of this period Plumptre did duty as one of the crew of the defendant's ship; and the

defendant has not paid him any wages, or given him any clothes or pocket-money, and 12*l.* is a fair compensation for his services from Halifax to Shields.

The question for the opinion of the court is, whether the plaintiff is entitled to recover, — if he is, the rule to be made absolute; if not, the rule to be discharged.

Gaselee for the plaintiff.

Scarlett, contra.

LORD ELLENBOROUGH, C. J. When this case was before me at *nisi prius*, the plaintiff's right to recover was rested upon *Eades v. Vandeput*; ¹ and it occurred to me at that time, and afterwards still more strongly upon looking into that case, that it is but a very loose note; for as to the defendant Vandeput, who was in the king's service, supposing an action for work and labor could have been maintained, yet it was work and labor for the king, and not for Vandeput; and therefore in his character of captain of a ship of war he could not have been the object of such an action. It does not appear however by the note of that case what the form of the action was; if the captain had enticed away the apprentice, perhaps he might have been liable to tort. But under the uncertainty both of fact and form which attends that case, I think no very material argument is to be derived from it. However there are two other cases which do afford an argument more pregnant and important for the court to consider; I allude to the cases of *Hambly v. Trott*, and the more recent case of *Lightly v. Clouston*. I own I should be more inclined, for the better preserving the simplicity of actions, to hold that where the seduction is the cause of action, the action ought to be in tort for the seduction; still I should go the length of holding with the case in *Salkeld*,² that where the apprentice in the course of his service had acquired a chattel, trover would lie for it; or if that chattel had been converted into money, that the master might follow it in all its representative forms. But when it comes to substituting the apprentice as an agent of the master for forming a specific contract, it seems to be going somewhat farther than the necessity of the case requires, or the authorities prior to *Hambly v. Trott* appear to warrant. What LORD MANSFIELD said in *Hambly v. Trott*, "that if a man take a horse from another, and bring him back, trespass will not lie against his executor, though it will against him, but an action for the use and hire of the horse will lie against the executor," I can only conceive to be founded on an assumption that the action for the use and hire of the horse would also have lain against the testator, because an executor is liable upon a supposition that his testator would also have been liable to the same species of action; for an executor is liable in the representative character which he bears to his testator. The difficulty therefore is in taking the first step, and saying that the tort may be waived for an action for use and hire upon the contract; that being some-

¹ 5 East, 39.

² *Barber v. Dennis*, Salk. 68.

what different from an action for money had and received for the produce of goods sold by the sheriff; or the case of *Smith v. Hodson*, where assumpsit was held to lie by the assignees upon a contract made with the bankrupt. In this case, upon the authority of *Hambly v. Trott*, in which the power to waive the tort and take to the contract is put by Lord MANSFIELD, and illustrated by the case of cutting down trees, it is argued that an action for the work and labor of the apprentice, that is, for the benefit acquired by the defendant from the service of the apprentice, is maintainable. In *Lightly v. Clouston* the same case was before the court, and it seems as if the Chief Justice upon that occasion entertained nearly the same doubts as I do now; but he appears to have yielded to the authorities, and to have considered that the master might waive the tort and adopt the contract. I think therefore that these cases, to the authority of which I bend, go the length of the present case, though I must confess that I do not accede to them with the same conviction that I do to many others.

LE BLANC, J. I think it has been decided in many cases that tort may be waived, and an action on contract substituted. I think also that by the help of a few principles the court will be warranted in determining this case in favor of the plaintiff. It is clearly established by all the cases that the master is entitled to the labor and earnings of his apprentice, during the whole term of his apprenticeship. It is likewise established by the cases, that if those earnings have got into the apprentice's hands, the master may claim and recover them. That was clearly determined in the case cited from equity, where the apprentice, having left his master and gone on board a privateer, became entitled to a share of a prize; the case was afterwards compromised, but the opinion of Lord HARDWICKE was, that the master was entitled to all that the apprentice earned; and although the share had not got into the apprentice's hands, yet it was to be considered as earnings, though in the shape of a share of prize, because it was in the nature of a compensation for the labor and industry of the apprentice. Also in several cases it has been determined with respect to the sheriff who sells goods, or with respect to a person who is in possession, by wrong, where the party might bring tort if he pleased, yet he may maintain an action founded on contract. In the cases which have decided that money had and received may be maintained without any privity between the parties, though it has been truly said that those decisions are founded upon the principle that the money belongs in justice and equity to the plaintiff, yet in order to attain that justice, the law raises a promise to the plaintiff as if the money were received to his use, which in reality was received by a tortious act. These instances are independent of those put by Lord MANSFIELD in *Hambly v. Trott*; which he puts as clear law, though he does not cite authorities for them. As in the instance of the executor being chargeable for the trees cut by his testator, that imports that the owner of the trees might waive the tort, and bring an action as for trees

sold and delivered. In the same manner the case of a man taking another's horse imports that the trespass may be waived, and an action for the use and hire of the horse substituted. And these cases are independent of *Lightly v. Clouston*, which is a determination on this particular point. As to *Eades v. Vandeput*,¹ it would hardly be a sufficient authority as it stands upon the report alone, without farther inquiring into the form of action, for the court to found their decision upon, except so far as it supports the general proposition that I set out with, that the master is entitled to the earnings of his apprentice, and that the court will follow those earnings wherever it can. Here undoubtedly the plaintiff might have maintained tort for the wrongful detaining of his apprentice; but, inasmuch as the defendant has had a beneficial service of the apprentice, the plaintiff may waive the tort and require of him the value of the benefit. I should also be inclined to consider that as there was a contract, the master might avail himself of it, as the apprentice was under an incapacity of making any contract except for the benefit of his master. I should consider it in the same light as where a party purchases under the sheriff, and has not paid, the party interested may avail himself of the contract made with the sheriff. Upon these grounds I think this action is maintainable.

BAYLEY, J. To decide that this plaintiff is not entitled to recover, would be to overrule the decision of *Lightly v. Clouston*, and also to impeach the doctrine in *Hambly v. Trott*. Both cases appear to have been well considered, and no contrary authorities have been produced; and I am not aware that they contain principles inconsistent with others. It has often been laid down that you may waive the tort and bring assumpsit: and in no instance that I can foresee, will that be prejudicial to the defendant; because in assumpsit the party cannot recover more than in an action of tort; in many instances he will recover less. And oftentimes there would be a defect of justice if this could not be done. After the death of the tort-feasor the action as far as it respected the tort would not be maintainable, and therefore there could be no remedy by way of action at all unless the tort could be waived. Thus in the case of taking goods, unless the tort could be waived, no action at all would lie after the party's death. Founding myself therefore on the principles laid down in *Hambly v. Trott*, and upon the decision of *Lightly v. Clouston*, I think this plaintiff is entitled to recover.

Rule absolute.

¹ 5 East. 39.

ABBOTTS AND ANOTHER *v.* BARRY.IN THE COMMON PLEAS, NOVEMBER 25, 1820.¹

[Reported in 2 Broderip & Bingham, 369.]

ASSUMPSIT for goods sold and delivered, money had and received, and the other money counts.¹ The following case, in substance, was proved at the trial before PARK, J. (London sittings after Trinity term last) : Phillips, being indebted to the defendant, for the purpose of discharging the debt procured wines from the plaintiffs, by a string of contrivances, which amounted to a gross fraud, paying the plaintiffs only half the price of the wines, and giving a bill, which was of no value, for the residue. In these contrivances, the defendant was prime mover and participator, and furnished Phillips with the money to pay in part. The wines were then, under defendant's direction and brokerage, sold in Phillips's name, to Bunyan, who accepted a bill drawn by Phillips for the amount, which Phillips immediately indorsed to the defendant.

The jury found a verdict for the plaintiffs, on the ground that a gross fraud had been practised on them by the defendant; the learned judge giving leave to the plaintiff to move to set aside this verdict and enter a nonsuit. Accordingly,

Vaughan, Serjt., having, in the last term, obtained a rule *nisi* to that effect.

Pell, Serjt., now showed cause.

Vaughan, Serjt., *contra*.

DALLAS, C. J. I think that this rule ought to be discharged, and upon this plain ground, that the jury have found a fraud in the defendant, committed by him through the medium of Phillips. Nor can I distinguish between Phillips and the defendant in the prosecution of this fraudulent transaction, for Phillips stands in the light of agent to the defendant throughout the whole contrivance. But it is not necessary to go that length, nor do I wish to come to any decision uncalled for by the case before the court. I confine myself, strictly, to this. Here was a sale of wines, the property of the plaintiffs, brought about by fraud and collusion, in which the defendant, who was to reap the benefit of such sale, was prime mover. Now, it is admitted, that a sale effected by fraud works no change of property;² the property, then, in this case, remained in the original owner, and therefore I hold the profits of the sale in the hands of the defendant to be so much money had and received by him, to the use of

¹ There was a special count, which was abandoned.

² In the case of a sale induced by fraud a voidable title passes. *Benjamin on Sales*.

4 Am. Ed. 474. — Ed.

the plaintiffs, who were the original proprietors. On this ground, I am of opinion, that this application must be dismissed.

PARK, J. This was a case of the most gross fraud, practised by the defendant on the plaintiffs, through the instrumentality of Phillips, and no violence will be necessary to bring it within the decided cases. *Hill v. Perrott*¹ is not, in principle, to be distinguished from this case; and I have a manuscript note of an additional point which was ruled in the case of *Corking v. Jarrard*.² It appeared there, that a servant had received money from her master, and applied it to the purposes of lottery insurance. Lord ELLENBOROUGH held, on the authority of *Clarke v. Shee*,³ that the master might recover the money back from the lottery-office keeper, as money had and received.

BURROUGH, J., concurred.

Rule discharged.

FERGUSON AND ANOTHER v. CARRINGTON.

IN THE KING'S BENCH, JANUARY 24, 1829.

[*Reported in 9 Barnewall & Creswell, 59.*]

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before Lord TENTERDEN, C. J., at the London sittings after last term, it appeared that the plaintiffs, between the 29th of March and the 12th of May, 1828, sold to the defendant various quantities of goods, amounting in the whole to 282*l.*, which, by the contract of sale, were to be paid for by bills accepted by the defendant; and that such acceptances were given, but had not become due at the time when the action was commenced. It appeared further, that the defendant immediately after receiving the goods sold them at reduced prices to other persons. It was contended, under these circumstances, that it was manifest that the defendant purchased the goods with the preconceived design of not paying for them; and that, as he had sold them, the plaintiffs might maintain an action to recover the value though the bills were not due. Lord TENTERDEN, C. J., was of opinion, that if the defendant had obtained the goods with a preconceived design of not paying for them, no property passed to him by the contract of sale, and that it was competent to the plaintiffs to have brought trover, and to have treated the contract as a nullity, and to have considered the defendant not as a purchaser of the goods, but as a person who had tortiously got possession of them; but that the plaintiffs by bringing assumpsit had affirmed that, at the time of the action brought, there was a contract existing between them and the defendant. The only contract proved was a sale of goods on credit. The time of credit had not expired, and consequently the action was brought too soon.

¹ 3 Taunt. 274.

² 1 Camp. 37.

³ Cowp. 197.

F. Pollock now moved for a new trial, and contended, that the plaintiffs might sue for the price of the goods without waiting until the expiration of the credit given; that credit having been obtained in pursuance of a fraudulent design to cheat the plaintiffs.

BAYLEY, J. The plaintiffs have affirmed the contract by bringing this action. The contract proved was a sale on credit, and where there is an express contract, the law will not imply one.

LITLEDALE, J. At the time when this action was brought, the defendant was not bound by the contract between him and the plaintiffs to pay for the goods. The plaintiffs claim to recover for breach of the contract.

PARKE, J. As long as the contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action, they affirm the contract made between them and the defendant.

*Rule refused.*¹

Grant

MARY OUGHTON v. SEPPINGS.

IN THE KING'S BENCH, TRINITY TERM, 1830.

[*Reported in 1 Barnwell & Adolphus, 241.*]

THIS was an action for money had and received. Plea, general issue. At the trial before GARROW, B., at the summer assizes for the county of Norfolk, 1829, the following appeared to be the facts of the case: The defendant, who was a sheriff's officer, on the 28th of May, 1829, received a warrant from the sheriff of Norfolk to levy a sum of money on one Winslove. He took a pony-cart and harness, which Winslove at the time of seizure was using; his name was painted on the cart. Winslove lived as a lodger with the plaintiff. She claimed the pony as hers, and gave notice to the sheriff, and the defendant, that she would bring an action; but it was sold by the sheriff under the execution, and the defendant admitted that he had received 8*l.* 10*s.*, the sum which it produced at the sale. Winslove was called as a witness on the part of the plaintiff; and he proved that he had purchased the pony for her at her request, and that he had paid for it with money which she had provided. It appeared, however, that at the time when the pony was purchased, and for several months afterwards, the husband of the plaintiff was alive, but that after his death the plaintiff fed the pony, and paid bills for its hay and shoeing, though it was used as generally by Winslove as by the plaintiff. No probate of will, or letters of administration, were produced. It was objected on the part of the defendant, that, assuming even that the plaintiff might have

¹ *Read v. Hutchinson*, 3 Camp. 351; *Strutt v. Smith*, 1 C. M. & R. 312; *Allen v. Ford*, 19 Pick. 217 *accord.* *Conf.* *De Symons v. Minchwich*, 1 Esp. 430. — Ed.

maintained trespass for the taking of the horse, she could not maintain the present form of action, which was founded upon a contract; that the pony, having been the property of the husband, passed on his death to his personal representative, and it had not been shown that the plaintiff was either executrix or administratrix. The learned judge thought that the plaintiff might waive the tort, and bring this action against the defendant, who had admitted that he had received the proceeds of the sale; and he directed the jury to find for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose, *Storks*, Serjt., was now to have shown cause, but the court called upon

Austin to support the rule.

LORD TENDERDEN, C. J. There was evidence here, though perhaps slight, that the plaintiff was in possession of the pony. If she was in possession at the time when it was seized, she might clearly have maintained trespass against a wrong-doer; and if she might maintain trespass, she may waive the tort, and maintain this action to recover the money which was produced by the sale of the horse, and which the defendant has admitted he received.

BAYLEY, J. It appears that the plaintiff was acting in the character of owner of the pony, for she fed it. As against a wrong-doer, that is *prima facie* evidence of title. If she had sought to recover the produce of the chattel against a person who had a conflicting title to it, she ought to have gone further; but as against a mere wrong-doer, not claiming any title whatever to the chattel, I think the evidence of possession was sufficient. The plaintiff was either rightful executrix or administratrix, or executrix *de son tort*. In either case she had a sufficient title to enable her to maintain this action for money had and received against a person who wrongfully retained in his hands the proceeds of a chattel belonging to her in one of those characters.

LITLEDALE, J., concurred.

Rule discharged.

YOUNG, ASSIGNEE OF YOUNG, A BANKRUPT, v. MARSHALL AND
POLAND, SHERIFF OF MIDDLESEX.

IN THE COMMON PLEAS, NOVEMBER, 19, 1831.

[Reported in 8 Bingham, 43.]

THIS was an action for money had and received, brought by the plaintiff, as assignee of Young, a bankrupt, to recover the proceeds of certain goods of the bankrupt sold by the defendants as sheriff of Middlesex, under a writ of *fiери facias*; the commission of bankrupt having been issued against Young on an act of bankruptcy anterior to the writ of *fi. fa.*

The defendants had no notice of the bankruptcy until after the levy, when they paid the proceeds over to the execution creditor under an indemnity.

A verdict having been found for the plaintiff,

Taddy, Serjt., obtained a rule *nisi* to set it aside, on the ground that the action was misconceived, and ought to have been trover; contending that the action for money had and received did not lie, at least against a public officer, where the money had been paid over and the property changed.

Wilde, Serjt., proceeded to show cause, when the court called on *Taddy* to support his rule.

TINDAL, C. J. The verdict for the plaintiff in this case may be supported on a principle generally known and acknowledged in Westminster Hall. This is an action by the assignee of a bankrupt against the sheriff of Middlesex, on the ground that he has sold, under a *fi. fa.*, goods belonging to the plaintiff, and which he ought not to have taken. But no party is bound to sue in tort, where, by converting the action into an action of contract, he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because that form of action lets in a set-off, and enables him to pay money into court. It has been contended, however, that the action does not lie here, because the defendant has paid the money over to a judgment creditor without notice of the act of bankruptcy. If that were so, I should agree that the money was no longer in the defendant's hands to the use of the plaintiff; but money paid over on an indemnity may be said not to have been paid over at all; the defendant, however, paid after notice, for he paid upon an indemnity, and that could only have been exacted on knowledge of the facts. The case, therefore, falls within the general rule, that a party is not bound to sue in tort, where, by suing in contract, he produces no injury to the defendant.

PARK, J. The indemnity is of itself strong evidence of notice before the payment.

BOSANQUET, J. By relation to the act of bankruptcy, the property was in the plaintiff at the time of sale. The plaintiff, who sues in an action for money had and received, does not thereby affirm the acts of the sheriff, he merely waives his claim to damages for a wrong, and seeks to recover only the proceeds of the sale. It is true the sheriff is a public officer, but if he pays over upon an indemnity, he pays with notice, and the plaintiff, who is entitled, must recover.

ALDERSON, J. If ever the question should arise, whether the sheriff is liable when he has sold and paid over without notice of the act of bankruptcy, the court will determine it; but no such question arises here, because the indemnity is virtually notice. It has been urged, that the property is changed by sale; and so it is as between a purchaser and the party against whom execution has issued, but not as against a party whose goods

have been wrongfully taken. By proceeding by the action for money had and received, the party merely waives his claim to damages for the seizure and detention of the goods, and is content to sue for the proceeds.

Rule discharged.

THE MAYOR, ALDERMEN, AND BURGESSES OF NEWPORT
v. SAUNDERS.

IN THE KING'S BENCH, APRIL 19, 1832.

[*Reported in 3 Barnewall & Adolphus, 411.*]

ASSUMPSIT for tolls and stallage. At the trial before PARK, J., at the spring assizes for Winchester, 1832, the jury found a verdict for the plaintiffs on the count for stallage, with 1s. damages; and were discharged of the issue as to the tolls.

Coleridge, Serjt., now moved for a rule to enter a nonsuit.

LORD TENTERDEN, C. J. I do not see any objection to the form of action. Tolls may be recovered in assumpsit, and no proof is given of anything like a contract by the party against whom the claim is made. Evidence is given of the right to receive them, and that is always deemed sufficient. Stallage is not distinguishable from tolls in that respect. The party entitled to stallage may waive the tort. In the *Mayor of Northampton v. Ward*¹ the court decided that trespass was maintainable; but what was said as to bringing debt or assumpsit was extra-judicial.

LITLEDALE, J. Assumpsit lies for the use and occupation of premises at the suit of the owner. Now stallage is a satisfaction to the owner of the soil for the liberty of placing a stall upon it. If assumpsit be maintainable in the one case, there is no reason it should not in the other.

PARKE and PATTESON, JJ., concurred.

Rule refused.

CLARANCE v. MARSHALL.

IN THE EXCHEQUER, HILARY TERM, 1834.

[*Reported in 2 Crompton & Meeeson, 495.*]

DEBT for money had and received. Plea, *Nil debet*.

A verdict having been given for the plaintiff, *Coleridge*, Serjt., in Michaelmas term last, obtained a rule to enter a nonsuit, in pursuance of the leave reserved at the trial.²

¹ 2 Stra. 1239; 1 Wils. 115.

² The remaining facts are sufficiently stated in the opinion of BAYLEY, B. — ED.

Erle showed cause.

Coleridge, Serjt., contra.

The judgment of the court was now delivered by

BAYLEY, B. There was a case of *Clarence v. Marshall*, which was argued before us in the course of this term. It was an action for money had and received, and the circumstances on which the plaintiff sought to found his right to recover were shortly these: The plaintiff's wife was admitted to some copyhold premises in the year 1810, whilst she was living with the defendant, who was her father. This admittance took place soon after the decease of her mother, who had been admitted to the same premises in 1804. The defendant's daughter was afterwards, in the year 1815, married to the plaintiff in this action. The rents and profits of the copyhold in question were received by the defendant from the time of Mrs. Clarence's admittance to the time of bringing the present action, and they probably had been so received by him during his wife's lifetime. It was insisted on behalf of the plaintiff, that the father must have been considered as receiving the rents subsequently to the admission of his daughter on her behalf, and therefore that such receipt of rent did not constitute an adverse possession as against the daughter, but that he was the agent to receive the rents for her until her marriage, and for the plaintiff her husband after that event. On this view of the case the plaintiff has brought the present action for money had and received. Now, that is a species of action in which if you establish agency clearly, why then you may treat the rents received by your agent as so much money received for your use; but you must make out most clearly that an agency subsisted in point of fact before you can maintain an action for money had and received, which is not an action in which rents received under an adverse holding or possession are recoverable by the rightful owner. The plaintiff, therefore, was bound to give some evidence to show that the relation of principal and agent existed. In the present case there was no proof that the defendant received the rents as agent for his daughter, or in any other capacity than that of owner. The land was let by him in his own name, and there was nothing to show that he ever admitted that he was acting merely as the father of the plaintiff's wife, or that his daughter was the principal, and he merely her agent. No proof of title in any party to these rents and profits was given in evidence, except through the medium of the court rolls. On those the title appeared to have been in the wife and daughter by their respective admittances; but it did not appear whether the defendant was privy to the entries in the court rolls, or knew of the admittances. It does not appear that he attended at the admittance either of his wife or his daughter; and, though you must clothe yourself with the legal title by admittance, generally there is no great difficulty in a party obtaining admittance to a copyhold. In the absence of proof, however, that the defendant had received the rents in question in right of his wife or

daughter, or his daughter's husband, or as their agent, we are of opinion that the present verdict cannot stand ; but, under these circumstances, we think it right that the plaintiff should have an opportunity of giving evidence if he can of such agency ; and therefore, if he wish, he may have a new trial upon payment of costs.

Rule accordingly.

CAMPBELL v. FLEMING AND ANOTHER.

IN THE KING'S BENCH, APRIL 18, 1831.

[*Reported in 1 Adolphus & Ellis, 40.*]

ASSUMPSIT for money had and received. Plea, the general issue. On the trial before DENMAN, C. J., at the sittings after last Hilary term, at Guildhall, the plaintiff proved that, in consequence of an advertisement in the newspapers, he entered into a negotiation for the purchase of some shares in a supposed joint stock mining company, and, upon representations made to him by the agents of the defendants, became the purchaser of shares to a large amount. After the purchase was concluded, he discovered that the statements in the advertisement, and many of the representations made to him in the course of the negotiation, were fraudulent, and that the whole scheme was a deception. The real sellers of the shares were the defendants. The action was brought to recover back the money paid for the shares. On the cross-examination of the plaintiff's witnesses, it appeared that, subsequently to the above transactions, the plaintiff formed a new company, by consolidating the shares originally purchased by him with some other property ; and he sold shares in the new company, thereby realizing a considerable sum of money. Evidence was further given on the part of the plaintiff, to show that, at the time of the original purchase, an outlay of 35,000*l.* was represented to him to have been made by the supposed mining company in the purchase of property, which outlay in fact had not amounted to 5000*l.*, and that this part of the fraud was not discovered by him till after he had disposed of the shares in the new company. The Lord Chief Justice nonsuited the plaintiff.

F. Pollock now moved for a rule to show cause why the nonsuit should not be set aside and a new trial had.

LITTLEDALE, J. It seems to me that this nonsuit was right. No doubt there was, at the first, a gross fraud on the plaintiff. But after he had learned that an imposition had been practised on him, he ought to have made his stand. Instead of doing so, he goes on dealing with the shares ; and, in fact, disposes of some of them. Supposing him not to have had, at that time, so full a knowledge of the fraud as he afterwards obtained, he

had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.

PARKE, J. I am entirely of the same opinion. After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; and the fraud could do no more than entitle him to rescind. It is said, that another fraudulent representation was subsequently discovered. I cannot, however, perceive that the evidence goes far enough to show that such a representation was, in fact, made.

PATTESON, J. No contract can arise out of a fraud; and an action brought upon a supposed contract, which is shown to have arisen from fraud, may be resisted. In this case the plaintiff has paid the money, and now demands it back, on the ground of the money having been paid on a void transaction. To entitle him to do so he should, at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says that he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and it cannot revive the right of repudiation which has been once waived.

LORD DENMAN, C. J. I acted upon the principle which has been so clearly put by the rest of the court. There is no authority for saying that a party must know all the incidents of a fraud before he deprives himself of the right of rescinding.

*Rule refused.*¹

Court —

MARSH AND OTHERS, PLAINTIFFS IN ERROR, v. KEATING, DEFENDANT
IN ERROR.

IN THE HOUSE OF LORDS, JUNE 25, 1834.

[*Reported in 1 Montagu & Ayrton, 582.*]

THIS action was brought in pursuance of an order of the LORD CHANCELLOR for the purpose of trying the question whether the defendants below and Henry Fauntleroy were at and before the date and issuing forth of the commission of bankruptcy against them, and still are, indebted to the plaintiff below, in any and what sum of money.² The declaration contained merely

¹ A party rescinding a contract because of fraud cannot retain any of the benefits received thereunder. — *Leake, Digest of Law of Contracts, 395.*

The retention by an insurer of the premiums received on a policy of insurance which he avoids on the ground of fraud, seems to be an established exception to this rule. — *2 Arnould, Law of Marine Insurance, 6 Ed. 1108; Friesmuth v. Agawan Insurance Co., 10 Cush. 587. [Ed.]*

² This sentence and the title of the case have been taken from the case as reported in 1 Bing. N. C. 198. — *Ed.*

the common count for money had and received to and for the use of the plaintiff. The defendant pleaded the general issue. The cause was set down for trial at the London sittings after Hilary term, 1832, and a special verdict was taken by consent, the substance of which is as follows :—

That on the 10th of October, 1819, there was standing in the Bank of England 12,000*l.* [here follow statements as to the mode of entry and transfer of stock]. That Marsh received the dividends thereon in October, 1819, under a power of attorney dated 7th June, 1809, from Ann Keating to Marsh, Sibbald, Stracey, and Fauntleroy, then composing the firm, and paid them into the banking-house of Marsh & Co. to the account of Ann Keating, who kept a banking account there. That on the 29th of December, 1819, an entry was made in the transfer books of the Bank of England, purporting to be a transfer of 9000*l.* stock, under power of attorney which purported to be granted by Ann Keating to Fauntleroy,—to W. B. Tarbutt, stockbroker to Marsh, Stracey, and Graham, then constituting the firm of Marsh & Co. That this power of attorney was not executed by Ann Keating, but her signature forged by Fauntleroy. That on the 11th of January, 1820, Marsh & Co. purchased for and caused to be transferred to Ann Keating 3000*l.* stock, whereby there appeared 6000*l.* standing in the name of Ann Keating, and no more ;¹ on the 5th of April, 1820, Marsh received the dividends on this 6000*l.* stock, as the attorney of Ann Keating. That since the 29th of September, 1819, numerous transfers of stock had been made to and by W. B. Tarbutt, and that the 9000*l.* stock had become blended in the bank books with other stocks standing in his name, and appeared to have been transferred by him, and it was not possible to distinguish the account to which the credit of the 9000*l.* stock stood ; and that no dividend warrant had since the 9th of December, 1819, been made out in respects of the dividends on the 9000*l.* stock in favor of Ann Keating, but to other persons appearing on the bank books to be the transferees thereof.

That Ann Keating did not consent to and had no knowledge of the transaction as to the 9000*l.*

That on the 10th of September, 1824, Fauntleroy was apprehended on a charge of forging letters of attorney, was indicted and prosecuted by the bank, and executed the 30th of October, 1824. That Ann Keating informed the bank of the forgery as soon as it came to her knowledge ; neither Ann Keating nor the bank indicted Fauntleroy for the forgery as to Ann Keating's 9000*l.* stock. That Marsh & Co. kept an account with Martin & Co., bankers ; that the usual pass-book was used, and that the house-book of Marsh & Co. ought to correspond therewith. That Fauntleroy generally kept this pass-book locked up in his desk. That Fauntleroy conducted the greater part of the business of the banking-house without

¹ Originally she had 12,000*l.* stock. Fauntleroy transferred 9000*l.*, leaving 3000*l.* ; to which Marsh added 3000*l.*, making 6000*l.*, as above.

the interference of the other partners, who reposed great confidence in him. That Fauntleroy made very many false entries and omissions in the house-book, so that it did not correspond with the pass-book. That Fauntleroy paid to Martin & Co., and drew out of their hands, considerable sums for his individual use, which appeared in the pass-book, but not in the house-book. That Fauntleroy also made very many false entries in the other books of the firm, without the knowledge and in fraud of his partners, to a large amount.

That on the 29th of September, 1819, Fauntleroy ordered Simpson, a stockbroker, to sell out 9000*l.* stock, described as Ann Keating's, who sold it to Tarbutt for 6018*l.* Simpson allowed Marsh & Co. one half the usual commission on such sales. The proceeds were paid to Martin & Co., on account of Marsh & Co. No entry was made of this sale in the house-book, nor in any other book of Marsh & Co., but only in the pass-book of Martin & Co. None of the firm of Marsh & Co. could draw moneys out of the banking-house of Martin & Co., but by drafts signed in the partnership name.

That a commission issued against Marsh, Stracey, and Graham on the 16th of September, 1824; and on the 29th of October, 1824, one issued against Fauntleroy.

That from April, 1820, up to the bankruptcy, credit was given to Ann Keating for the dividends on 15,000*l.* stock, parcel thereof being the 9000*l.* stock before mentioned; entries being made by Fauntleroy, or under his immediate direction, as if these dividends had regularly been received from time to time. That till the apprehension of Fauntleroy, Messrs. Marsh, Stracey, and Graham were wholly ignorant of the forgery on Ann Keating.

That after the bankruptcy Ann Keating applied to the bank respecting the 9000*l.* stock, and received a letter from the bank solicitors, informing her that she might prove against Marsh & Co., and that on assigning her proof to the bank they would replace her stock. On the 1st of August, 1825, the bank paid Ann Keating the dividends on 9000*l.* stock without prejudice, she engaging to tender a proof. Ann Keating, being examined before the commissioners, signed an admission of some of the above facts, and that her claim was prosecuted by and for the benefit and at the expense of the bank, and that if it failed she insisted on her claim against the bank; and the verdict concluded specially.

In Easter term, 1832, judgment was entered up in the King's Bench for the plaintiff, without argument; a writ of error was thereupon brought, *pro forma*, in the Court of Exchequer Chamber, and the judgment below, without argument, was affirmed. The judgments were entered without argument, the object of the parties being to bring the matter before the House of Lords without delay. From these judgments Marsh & Co. presented an appeal.

Mr. Justice PARK :—

The question amounts in substance to this : whether the produce of stock formerly standing in the name of Mrs. Ann Keating, the plaintiff below, but transferred out of her name on the 29th December, 1819, without her authority, and under a power of attorney which had been forged by one of the partners of the defendants below, the bankers of Mrs. Keating, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by the surviving partners to the use of the plaintiff below, and be recovered by her in that form of action. And after hearing the argument, and after consideration of the facts stated in the special verdict, all the judges who were present at the argument, including the LORD CHIEF JUSTICE of the Common Pleas, who is absent at Nisi Prius, and Mr. Baron BAYLEY, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative.

The first objection raised against the plaintiff's right to recover, and upon which great reliance has been placed, is an objection which, if allowed to prevail, would be equally strong against the plaintiff's right to recover damages in any form of action, and against any person. It is objected that the plaintiff below has not sustained any damage by the alleged transfer of the stock ; for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the statute to one mode only ; namely, "by entries in the transfer-books kept at the bank," which entry, it is enacted, "shall be signed by the parties making such transfers, or their attorneys, authorized by writing under their hand and seal," and that no other method of transferring stock shall be good. Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer-book kept at the bank not having been signed by the party making the transfer, nor by any attorney authorized by writing under her hand and seal, it is contended that it is altogether inoperative ; that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof ; and the case of *Davis v. The Bank of England*¹ is cited and relied upon as an authority directly in point in support of such proposition. But we hold it to be altogether unnecessary on the present occasion to discuss the proposition above advanced, or the authority of the case cited in support of it ; for although the proposition may be true to its full extent, and the authority of the case above cited in support of it may be free from all doubt or difficulty, still, under the circumstances stated in the special verdict, we are of opinion that the plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of

¹ 2 Bing. 309.

such stock as for her own money, which we think has been sufficiently traced into the hands of the defendants below.

It is unnecessary to enlarge upon the extreme difficulty, or, more properly, impracticability, under which Mrs. Keating would be placed, if, as matters now remain, she should elect either to receive the dividends or to sell her stock ; it is sufficient to observe that the special verdict finds that when stock is sold, an entry of the transfer is made in the bank books, and the name of the purchaser substituted for that of the seller ; that the dividend warrants are thenceforth made out in the purchaser's name, who receives the dividend, and the seller's name is no further noticed. Now, it is obvious that a transfer under a forged power or by an impostor has all the appearance, and unless impeached by the genuine stockholder to the extent to which the same can be impeached, the same consequences, as a genuine transfer ; his name is entered in the bank books as the stockholder ; the dividend warrants are made out in his name ; and he, as the holder of the warrant, has the right to insist upon the payment of the dividends ; and in this particular case the special verdict finds that it is not possible to distinguish the accounts, to the credit of which the plaintiff's stock, so sold under the power of attorney, now stands. If the plaintiff below, therefore, were to apply to receive payment of the dividends or to sell the stock, she would be met with an insuperable difficulty. Although the stock may, in contemplation of law, still be vested in her, it is certain that she could not either receive the dividend or sell the stock, until she had first compelled the bank to purchase, *de novo*, in her name, an equal quantity of the same stock.

Is she compelled to adopt this circuitous process, or is she at liberty to abandon all further concern with her stock, and to consider the price which was paid by the purchaser for that which was her stock to be her money, and to follow it into the hands of the present defendants below ?

This, as before stated, appears to us to be the question reserved for our consideration ; and upon this question we think her at liberty to give up the pursuit of the stock itself, and to have recourse to the price received for it, unless any of the objections which have been urged at your lordships' bar should be allowed to be available under the particular circumstances of this case.

The general proposition that where a party who has been injured has different remedies against different persons, he may elect which of them he will pursue, is not called in question. If the goods of A. are wrongfully taken and sold, it is not disputed that the owner may bring trover against the wrongdoer, or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price : but it is objected that such general rule will not apply to the present case, on various grounds which have been advanced on the part of the defendants.

Those objections appear to resolve themselves substantially into four.

1st, It has been urged that the transfer in this case being an act not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party. 2dly, That at all events in this case such election is taken away, upon the grounds of public policy ; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would in effect be to affirm a sale completed through a felony, and would give the plaintiff a right of action, arising immediately out of the felony itself. 3dly, That it does not appear, from the facts found in the special verdict, that the money produced by the sale of the stock came to the hands of the present defendants under such circumstances as would constitute it money had and received by the defendants below to the use of the plaintiff ; and lastly, That by the subsequent transactions between the plaintiff and the Bank of England, she has lost any right of action against the defendants, if she ever possessed it.

The first objection appears scarcely to apply to the present state of facts. It was urged at the bar that a lease under a power being void on account of a non-compliance with the terms of the power, or a lease under the enabling statutes being void on account of the non-observance of the requisites rendered necessary by those acts, such void lease cannot be set up or confirmed by any act of the lessor ; but these instances only prove that acts done to confirm the lease itself are nugatory, and that the estate of the lessee remains precisely the same as before such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu* ; it is perfectly indifferent to her whether the right of the transferee to hold the stock be strengthened or not. She is looking only to the right of recovering the purchase-money ; and if, in seeking to recover that, she does not by her election make the right of the purchaser weaker, it can be no objection that she does not make it better. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened, that after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning in any manner, the title of the purchaser of the stock.

As to the second objection, it may be admitted that the civil remedy is in all cases suspended by a felony, where the act complained of, which would otherwise have given a right of action to the plaintiff, is a felonious act. Upon this ground, Mrs. Keating would have lost any right of action which she could otherwise have had against Fauntleroy for the wrongful sale of her stock, without her authority, by reason of the felony committed by him, as the means of selling the stock. But this principle does not apply to the present case, upon two grounds. 1st, None of the present defendants had any privy or share whatever in the felonious act ; there is therefore no felony committed by them, in which the civil right arising against them, supposing it to exist, can merge or be suspended ; they are

innocent third persons. And 2dly, Fauntleroy, the person guilty of the forgery, had suffered the extreme penalty of the law before the action was brought, — not, indeed, for the commission of this particular forgery, but of another of the same nature ; and the present plaintiff having given to the bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the bar, — *Dawkes v. Cavanagh*¹ and *Crosby v. Laing*.² As to the argument that to affirm this sale is to affirm a felony, that point may be considered to have been decided in the cause of *Stone v. Marsh*,³ with which decision we entirely concur. Lord TEXTERDEN, in giving the judgment of the Court of King's Bench in that case, puts the question (page 565) in so clear a point of view that it will be better to transcribe his words : “ It was contended that the maxim of ratifying a precedent unauthorized act and taking the benefit of it, cannot apply to a void or felonious act, and that here the plaintiffs were seeking to ratify the felonious act of Fauntleroy, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendant's argument. The assertion is incorrect ; in fact, the plaintiffs do not seek to ratify the felonious act ; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, nor was the transfer, nor the receipt of the money ; the felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made.” We think, therefore, upon the reasons above given, that this second objection falls to the ground.

But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the defendants, so as to be money received by them to the use of the plaintiff ; and the consideration of this objection involves two questions : First, did the money actually come into the possession of the defendants ? Secondly, if it ever were in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy ? As to the first point, the special verdict finds expressly that Simpson, the broker, paid the sum of 601*3*l. 2*s*. 6*d*., being the amount of the sum received from Tarbutt — deducting one half of the usual commission — by a check payable to Marsh & Co. into the hands of Martin & Co. to the account of Marsh & Co. at the precise time of such payment ; therefore there can be no doubt but that it was as much money under their control as any other money paid in at Martin & Co.'s by any customer under ordinary circumstances. The house of Marsh & Co. might have drawn the whole of the bal-

¹ *Style*, 346.² 12 *East*, 409.³ 6 *B. & C.* 551.

ance into their own hands ; if the same money had been paid into Martin & Co.'s, as the produce of the plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm because, as found in the special verdict, it was entered in the account as "Cash per Fauntleroy," or because it never appeared in the house-book or any other books of Marsh & Co., but only in the pass-book of that firm with Martin & Co., or because it never came into the yearly balancing of the house of Marsh & Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others by preventing the money from being ultimately brought to the account of the house ; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power ; and that it was so appears to be distinctly stated in the special verdict.

But it is urged that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale into their account at Martin & Co.'s.

It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock ; but it is equally clear that the defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

If they had not the actual knowledge, they had all the means of knowledge ; and there is no principle of law upon which they can succeed in protecting themselves from responsibility in a case wherein, if actual knowledge were necessary, they might have acquired it by using the ordinary diligence which their calling requires.

As to the last ground of objection to the plaintiff's right to recover, it is argued that by the agreement into which she entered with the bank, and under which she has received, from the time of the sale, the dividends which would have become due, she has disaffirmed the sale with a full knowledge of all the facts, and therefore cannot now be allowed to set it up as a valid sale.

But it appears to us that it is sufficient to look at the terms of such agreement, to give an answer to the objection. That agreement expressly reserves to Mrs. Keating the right to have recourse either to the bank or the present defendants for her remedy, as she may be advised. It therefore leaves the question whether the sale be affirmed or not completely in uncertainty, until she make her election to have recourse to the one or the other ; and the agreement is one which causes no disadvantage to the

rights of the defendants, who, if liable, can only be liable once to the payment of the money actually received, whether the bank have in the mean time advanced the dividends or not.

Upon the whole, therefore, we beg to state our opinion to be that upon the question which has been proposed to us by your lordships, Ann Keating has the right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use.

The Lord Chief Justice of the Common Pleas desires to have it expressly understood that he fully concurs in the opinion now delivered.

The judges having given judgment in another case, the following observations were made by the LORD CHANCELLOR.

LORD CHANCELLOR. I was not present when the learned judges gave their opinion in the case of *Marsh v. Keating*, which was a case of considerable importance, and on that account was very fit to be brought here, and it was in consequence of that I recommended it should come here when it was before me in the court of chancery. The learned judges have all agreed in opinion, in support of the judgment below; I therefore move your lordships that the judgment be affirmed, but at the same time without costs, in consideration of the importance of the question, and the opinion of the court below having been in favor of taking the sense of your lordships' house.

Judgment affirmed, without costs.

SELWAY v. FOGG.

IN THE EXCHEQUER, EASTER TERM, 1839.

[Reported in 5 *Meeson & Welsby*, 83.]

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INDEBITATUS ASSUMPSIT for work and labor. Pleas, non-assumpsit, pay-
ment, and a set-off.

At the trial before Lord ABINGER, C. B., at the Middlesex sittings after last Michaelmas term, evidence was given to prove that the work was done, which consisted in carting away rubbish, and that the value of it amounted to about 20*l*. The defendant then gave evidence of a contract to do the work for 15*l*., which sum he had paid. The plaintiff insisted that that contract was obtained by a fraudulent misrepresentation as to the depth of the rubbish carted away, and that, being founded in fraud, it was no answer to the action. The Lord Chief Baron, however, was of opinion that the question of fraud was not open to the plaintiff in the present action, although it might be the subject of complaint in another action; especially as it had been shown that the plaintiff had knowledge of the circumstance indicative of fraud before the work was finished. He however left the facts to the

consideration of the jury, and they found that there was fraud in the contract, and returned a verdict in favor of the plaintiff for 5*l.* ; but the learned judge gave the defendant leave to move to enter a nonsuit or a verdict for the defendant. *Humfrey* having in last term obtained a rule accordingly, —

Erle now showed cause.

Humfrey and *Stewart*, *contra*.

LORD ABINGER, C. B. I am of opinion that this rule ought to be made absolute. At the trial, I was impressed with the opinion, and still remain so, that the plaintiff is not entitled to recover, and I think so on two grounds: First, because no one can be liable upon a contract which he never made nor intended to make; the very idea of a contract being, that it is an agreement entered into by two willing parties acting with their eyes open; a party cannot be bound by an implied contract, when he has made a specific contract, which is avoided by fraud. A person is not at liberty to say, "I have made two contracts, and if one of them is avoided by its fraud, then I will set up the other;" but if he repudiate that contract on the ground of fraud, as he may do, he has a remedy by an action for deceit. Secondly, it was clear upon the evidence that the plaintiff had full knowledge of all that constituted the fraud in this case, either before or during the work, and as soon as he knew it he should have discontinued the work and repudiated the contract, or he must be bound by its terms.

PARKE, B. I also think that in this case a nonsuit ought to be entered. The plaintiff sues for work and labor, and on the trial it turns out that there is a contract to do it for a specific sum. Assuming that the jury have properly found that this contract was fraudulent, in what situation is the plaintiff put? He may repudiate it, and be in the same situation as if it had no existence at all; but if he does not choose to do so, he cannot then set up another contract. This is established by two cases, — one, that of *Ferguson v. Carrington*, already cited, and the other that of *Read v. Hutchinson*.¹ If the plaintiff chooses to treat the defendant as a party who has contracted with him, he must be bound by the only contract made between them. The case is distinguishable from those where a third person intervenes, and where, looking at their real situation, that third person is also the agent of the party charged; at all events, no second contract is there set up, as here, which second contract is inconsistent and cannot be supported. I also think that, upon discovering the fraud (unless he meant to proceed according to the terms of the contract), the plaintiff should immediately have declared off, and sought compensation for the by-gone time in an action for deceit; not doing this, but continuing the work as he has done, he is bound by the express terms of the contract, and if he fail to recover on that, he cannot recover at all.

ALDERSON, B., and MAULE, B., concurred.

Rule absolute.

¹ 3 Camp. 351.

RUSSELL & OTHERS, ASSIGNEES OF JOSEPH NICHOLL, A BANKRUPT,
v. BELL AND ANOTHER.

IN THE EXCHEQUER, JANUARY 20, 1842.

[Reported in 10 Meeson & Welsby, 340.]

ASSUMPSIT. The fifth count was for goods sold and delivered by the plaintiffs, as assignees, to the defendants.¹

The defendants pleaded, first, except as to the sum of £320, parcel of the sums of money in the declaration mentioned, and except as to the further sum of £140, parcel of the sums in the first, second, third, and fourth counts mentioned, *non assumpsit*.

At the trial before Lord DENMAN, C. J., at the last summer assizes for the county of York, it appeared that the action was brought to recover the sum of £140 for yarn sold and delivered to the defendants, and £80 for money which it was alleged came to the defendants' hands after the bankruptcy;² as to the latter sum, however, no evidence was adduced. It was objected, at the conclusion of the opening speech of the plaintiff's counsel, that they were not entitled to go into evidence as to the £140, inasmuch as judgment had been already given against them as to that sum on the demurrer; that if it were otherwise, the plaintiffs would be proceeding twice to recover the same sum; that if the judgment had been the other way, and the plaintiffs were to obtain a verdict now for that sum, they would recover the same sum twice over. To this it was answered, that the second plea, on which judgment had been given for the defendants, was confined to the first four counts of the declaration. The learned judge said he should receive the evidence, giving the defendants leave to move to enter a nonsuit.

It was proved by a commission agent of the name of Froggatt, that on the 15th of October, 1839, he had eighty-five bundles of yarn of the bankrupt's in his possession, the value of which he said was about £114; that the bankrupt urged him to buy it, which he refused to do, but advised the bankrupt to sell it, which he said he would try to do. He afterwards came and said he had sold it, and sent a porter for it. Another witness proved that the defendant, Bell, had admitted to him that the bankrupt, Nicholl, had pressed him to receive some goods which the bankrupt and a porter brought to him, about the value of £100, and that they, the defendants, had received them. It was objected that there was no evidence of a sale of the goods, or of money had and received by the defendants to the use of the assignees; and the learned judge being of that opinion, was about to

¹ Only so much of the case is given as relates to this count. — Ed.

² The evidence relied upon to establish the bankruptcy has been omitted. — Ed.

nonsuit the plaintiffs, when the defendant Bell's examination was put in. On being asked when the yarn was delivered, he stated that the goods were sent by the bankrupt on account of an accommodation bill the defendants were about to give him; that the amount was £114. 15s., and that the goods were received by them, he believed, on the 17th of September, 1839; that he could not swear to the precise day, but he had no doubt of it; that the invoice which accompanied them bore that date; that they received no yarns from Froggatt's warehouse but those on the 17th of September. The invoice was as follows:

Messrs. HARRISON & BELL.

Sept. 17, 1839.

Bought of JOSEPH NICHOLL.

170 gr. 40 weft at 13s. 6d.

£114 15 0.

It was still objected that there was no evidence of any sale of the goods by the assignees to the defendants, or of money had and received by the defendants to the use of the assignees. The learned judge, however, thought the plaintiffs entitled to recover, and the jury, under his direction, found a verdict for £114 on the fifth count of the declaration, with leave to the defendants to move to enter a nonsuit.

Wortley having, in Michaelmas term last, obtained a rule to enter a nonsuit accordingly,

Cresswell and W. H. Watson now showed cause.

Wortley and Crompton, in support of the rule.

Lord ABINGER, C. B. Then Mr. Crompton says, that if you treat this as a sale, you must treat it as a sale with all the circumstances belonging to it. That proposition is true, with this qualification,—if the sale is made by an agent, and properly conducted for the supposed vendor, and the person buying is an honest buyer, the vendor must stand to the sale, and is bound by the contract; but if a stranger takes my goods, and delivers them to another man, no doubt a contract may be implied, and I may bring an action either of trover for them, or of assumpsit. This is a declaration framed on a contract implied by law. Where a man gets hold of goods without any actual contract, the law allows the owner to bring assumpsit;¹ that is the solution of it, and gets rid of the whole difficulty. Here the bankrupt took these goods, and delivered them to the defendants; on that an implied assumpsit arises that they are to pay the owners the value of the goods. I think that is an answer to Mr. Crompton's argument; and a whole class of cases have decided this point, that you may convert a tort into an action of assumpsit, by bringing an action for the value of the goods so sold, waiving the tort. Here the bankrupt is selling goods under false colors, in order to cover transactions he knew he could not otherwise cover; and he has no right to set up his own fraudulent contract. But the action

¹ T. W. & W. R. R. Co. v. Chew, 67 Ill. 378; Abbott v. Blossom, 66 Barb. 353, accord.—Ed.

43 Cal 380 2d ed. 1880 24 40
55 Ill 200 2d ed. 1880 24 40
76 Ill 200 2d ed. 1880 24 40
33 Ill 200 2d ed. 1880 24 40
Cresswell & Watson 2d ed. 1880 24 40
55 Pick 285 2d ed. 1880 24 40
159 53 Ill 682

being brought for goods sold and delivered by the assignees, and not by the bankrupt, the assignees have a right to waive the tort, and bring an action of assumpsit for goods sold and delivered.

ALDERSON, B. Then, if that be so, another question is, has there been a sale subsequent to these acts of bankruptcy to the defendants? I am supposing there are acts of bankruptcy proved prior to the 15th of October. There is proof that Bell comes to the bankrupt and persuades him to sell the yarn to him; there is the examination of Bell, in which he states that he has received the goods; and there is the invoice, in which it is stated that Messrs. Harrison and Bell (that is, the defendants) bought of John Nicholl (that is, the bankrupt) yarn to the amount of 114*l.* 15*s.* As against the defendants, this is sufficient evidence that they received those goods under a contract of sale for 114*l.* 15*s.* The defendant, when examined before the commissioners, tells a story about the goods; are we to take that story as it is, or are we not rather to take so much only as may reasonably be taken against the defendant, rejecting altogether the rest, and confine him to that on which he incurs responsibility? He must be answerable for that which makes against himself, where he is the offending party. If that be so, as it is a contract of sale, the defendants are bound to pay to these plaintiffs, who are the true proprietors of the goods, the sum they undertook to pay, namely, 114*l.* 15*s.*, which is the amount of the verdict.

GURNEY, B., concurred.

Rule discharged.

TEW v. JONES.

IN THE EXCHEQUER, MAY 22, 1844.

[*Reported in 13 Meeson & Welsby, 12.*]

DEBT for use and occupation of a messuage, etc. Plea, *nunquam indebitatus*. At the trial, before the under-sheriff of Cheshire, the plaintiff put in deeds of lease and release, dated in the year 1841, whereby the defendant and another person conveyed to the plaintiff an undivided moiety of five houses, of which they were seised as devisees in trust under a will. The defendant had occupied for a period of twenty-five years one of these houses, in respect of which this action was brought; but no evidence was given of any express contract of tenancy between him and the plaintiff for his occupation subsequent to the conveyance. At the close of the plaintiff's case, the defendant's counsel applied for a nonsuit, on the ground that there was no evidence of any tenancy, or of an occupation by the permission or sufferance of the plaintiff. The under-sheriff refused to nonsuit, and left the case to the jury, who found a verdict for the plaintiff.

Willes had obtained, in Easter term, a rule *nisi* to set aside the verdict and enter a nonsuit, first, on the objection taken at the trial, or, secondly,

on the ground that this action could not be maintained, the plaintiff and defendant being tenants in common of the premises.

Paskley showed cause.

Willes, contra.

POLLOCK, C. B. There must be some evidence of a holding by the permission of the plaintiff. Here the defendant, having conveyed a moiety of five houses to the plaintiff, remains in possession of one. There is no evidence of a tenancy in that.

ALDERSON, B., and GURNEY, B., concurred.

ROLFE, B. If a vendor remains in possession by agreement, the terms of that agreement will speak for themselves; if not he is a wrong-doer, and may be turned out by ejectment, and is liable in trespass for mesne profits. The supposed analogy of the case of mortgagor and mortgagee does not exist; the mortgagor is the tenant by sufferance of the mortgagee, in consequence of the peculiar relation existing between them, and which does not exist between a vendor and vendee.

Rule absolute for a nonsuit.

VAUGHAN, EXECUTOR OF JANE VAUGHAN v. MATTHEWS.

IN THE QUEEN'S BENCH, JANUARY 25, 1849.

[Reported in 13 Queen's Bench Reports, 187.]

ASSUMPSIT for money had and received. Plea, *non assumpsit*.

On the trial, before E. V. WILLIAMS, J., at the Chester spring assizes, 1848, it appeared that the defendant had, as representative of Anne Vaughan, the survivor of two sisters, brought an action upon and received payment of a note, payable, as he contended, to the two Miss Vaughans. The plaintiff, who was representative of the elder sister, Jane Vaughan, claimed the money, contending that the note was made payable to Miss Vaughan, and consequently to the plaintiff as her representative; and that it had been fraudulently altered by adding the letter "s," so as to make it purport to be payable to Miss Vaughans, and consequently to the surviving sister. There was conflicting testimony as to this. The learned judge gave the defendant leave to move to enter a nonsuit, and left it to the jury to say whether the money lent, which was the consideration of the note, was the joint loan of the two sisters; and whether the note had been altered. The jury answered the first question in the negative; but, being unable to agree on the second, they were ultimately discharged. *Chilton*, in the ensuing term, obtained a rule *nisi* for a nonsuit.

Welsby and *Townsend* now showed cause;¹ and *Chilton* and *Evans* supported the rule.

¹ Before Lord DENMAN, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

Lord DENMAN, C. J. The question in this case was whether an action for money had and received was maintainable.

The plaintiff was administrator of Jane Vaughan, who died in March, 1843. The defendant was executor of Anne Vaughan (sister of Jane), who died in March, 1844, and who was younger than Jane. Some time in 1839 Jane Vaughan lent 150*l.* to Evan Evans, and received from him as a security his promissory note for 150*l.*, payable, as it was said by the plaintiff, to Miss Vaughan. After the death of Anne, the defendant as her executor brought an action upon the note against Evan Evans, alleging it to be payable to the Miss Vaughans, and not to Miss Vaughan only; and, as Anne survived her sister, she would have the right to enforce payment. Evan Evans settled the action and paid the amount of the note to the defendant, who claimed as executor of the surviving payee. For the plaintiff it was alleged that the letter "s" had been fraudulently added to the word "Vaughan," and that the defendant had wrongfully received payment from Evans of the promissory note, which really belonged to the plaintiff as administrator of Jane Vaughan, the payee who furnished the consideration. For the defendant it was contended that, admitting the whole of the plaintiff's case as stated by him, an action for money had and received could not be maintained, and that the plaintiff must be nonsuited: and we are of opinion that the objection is well founded, and that the plaintiff cannot succeed in this form of action.

The defendant received the money in his own right, in payment of a note which, if genuine, would have been his property as executor of Anne Vaughan: the payment was not in respect of a note to which, if genuine, the plaintiff would be entitled; nor can the defendant be considered as acting in any respect as his agent. The facts stated do not raise the legal inference that the money paid by Evans was had and received by the defendant to the use of the plaintiff; Evans may still be liable to the plaintiff for the money lent to him by Jane Vaughan, if not upon the note; and the defendant may be liable to refund to Evans the money paid by the latter under mistake or misrepresentation; but there is no contract express or implied between the plaintiff and the defendant. In the case of *Marsh v. Keating*¹ the defendants had in their hands the proceeds of the sale of the plaintiff's stock; but in the present case the money in the defendant's hands is not proceeds of a note to which the plaintiff would have been entitled, but of another, which, if genuine, would have belonged to the defendant; and the cases are therefore distinguishable.

If the defendant had obtained payment of the genuine note by means of a false or forged representation of authority from the plaintiff, the case would have resembled that of *Marsh v. Keating*,¹ and the plaintiff might have adopted the agency and treated the money in the defendant's hands as had and received to his use, supposing the defendant not to have been

¹ 1 New Cas. 198.

actually shown to have himself committed a felony. The plaintiff in this case can only recover by adopting and assuming that which the defendant has done, namely, obtaining payment of a note payable to both the sisters, which would be inconsistent with his claim, and in effect destructive of it.

We are therefore of opinion that a nonsuit should be entered.

Rule absolute.

NEATE v. HARDING AND BOWNS.

IN THE EXCHEQUER, APRIL 24, 1851.

[*Reported in 6 Exchequer Reports, 349.*]

ASSUMPSIT for money had and received. Plea, *non assumpsit*.

At the trial, before MARTIN, B., at the Wiltshire spring assizes, the following facts appeared: The plaintiff's mother had for some time received parochial relief, but there being strong ground for suspecting that her poverty was feigned, and that she was in reality possessed of a considerable sum of money, the defendant Harding, who was assistant overseer of the Carne Union, and the defendant Bowns, one of the Wiltshire county constabulary, went together to her house for the purpose of searching for the money. Bowns remained outside, while Harding entered the house, and having found in a cupboard 163*l.*, he took it away with him. The money was afterwards taken to a bank by both the defendants, and paid in to their joint account. It was proved that the money belonged to the plaintiff. On the part of the defendants, it was objected, that under these circumstances the action for money had and received would not lie; and also that there was no evidence of a joint taking by Bowns. The learned judge overruled the objections, and directed a verdict for the plaintiff, reserving leave for the defendants to move to enter a nonsuit.

Kinglake, Serjt., now moved accordingly.

POLLOCK, C. B. We all agree that there ought to be no rule. The owner of property wrongfully taken has a right to follow it, and, subject to a change by sale in market overt, treat it as his own, and adopt any act done to it. That doctrine was carried to a great extent in *Taylor v. Plumer*,¹ and is fully explained by Lord ELLENBOROUGH in delivering the judgment of the court. In this case the money taken belonged to the plaintiff; and it did not cease to be his money because it was in the defendants' hands; he was therefore at liberty to waive the wrongful act, and treat it as money received by the defendants for his use. The mere presence of the defendant Bowns might not have sufficed to render him liable; but there is evidence that he concurred in placing the money in the bank in the joint names.

¹ 3 M. & S. 562.

PARKE, B. I am also of opinion that there ought to be no rule. The plaintiff was bound to prove a joint act by both defendants, and under such circumstances as entitled him to maintain an action for money had and received. All difficulty on the first part of the case was obviated by showing that the money was paid into the bank on the joint account. It then became the same as if one individual alone had placed it there ; and in my opinion it was competent for the plaintiff either to bring trover or trespass for taking the particular coin, or to waive the tort and sue for money had and received. I arrive at that conclusion by the same process of reasoning as in the cases cited ; because it is admitted that, if a person wrongfully takes the goods of another and converts them into money, the latter has a right to recover the proceeds in an action for money had and received. That doctrine is explained in *Lamine v. Dorrell*, by POWELL, J., who says, “that the plaintiff may dispense with the wrong, and suppose the sale made by his consent.” We need not go so far in the present case ; all that is necessary is, that the plaintiff should have a right to waive the wrongful act ; then the defendants, having got the money of the plaintiff in their hands, must pay it back to him again.

PLATT, B. The receipt of the money by the bankers on the joint account operated as a receipt from both defendants. So that the defendants had the money of the plaintiff in their hands, and consequently he was entitled to treat it as money received for his use.

MARTIN, B. If the case had stood simply upon the taking of the money out of the house, I should have had some doubt whether the action for money had and received would lie, for that is an action on a contract ; and torts and contracts are of a very different nature. I own, to me the more sensible rule is, that if there be a contract, the party should bring an action for money had and received ; and if there be a trespass, he should bring trespass or trover. But when it was proved, as in this case, that after the money was taken both defendants went and paid it into the bank on their joint account, that makes them both responsible as upon a contract, for they enter into a contract with the bank in respect of the money ; and therefore I think that the action for money had and received is maintainable. I should always be disposed to act upon the principle laid down in the case of *Turner v. Cameron's Coalbrook Steam Coal Company*, which treats the case of a tort, as in truth it is, a tort, and the case of a contract, as a contract.

Rule refused.

BUCKLAND *v.* JOHNSON.

IN THE COMMON PLEAS, JUNE 7, 1851.

[*Reported in 15 Common Bench Reports, 145.*]

THE plaintiff declared for money had and received, goods sold and delivered, and money found due upon an account stated, and also "for that the defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods."

The defendant pleaded, —

Fourthly,¹ as to so much of the declaration as related to money payable for money received by the defendant to the plaintiff's use, and to the said household furniture, glass, linen, china, books, and plate, — that the said [money was money received for, and as, and being the proceeds of the sale of the goods in the last count and hereinafter mentioned²], and that the grievances in the last count mentioned, so far as they related to the said household furniture, glass, linen, china, books, and plate were committed by the defendant and the said Thomas Barber Johnson jointly, and not by the defendant alone, which said Thomas Barber Johnson, at and from the time of the accruing of the causes of action to which this plea was pleaded, until and at the time of the recovery of the judgment thereafter mentioned, was with the defendant jointly liable to the plaintiff for the said causes of action: That, after the accruing of the causes of action to which that plea was pleaded, and before that action, the now plaintiff commenced, in the court of our lady the Queen before her justices at Westminster, commonly called the Court of Common Pleas at Westminster, an action at law against the said Thomas Barber Johnson, and by his declaration in that action the now plaintiff declared, and said, amongst other things, that he sued the said Thomas Barber Johnson for money payable by the said Thomas Barber Johnson to the plaintiff for money received by the said Thomas Barber Johnson to the plaintiff's use; and for that the said Thomas Barber Johnson converted to his own use, and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, household furniture, household utensils, books, and pictures; and the plaintiff by his said declaration in that action claimed 500*l.*: That such proceedings were thereupon had in the said court in that action, that after-

¹ Only so much of the case is given as relates to this plea. — Ed.

² The words within brackets were inserted, by way of amendment, in substitution of the following: — "debt for money received became due from, and was contracted by, the defendant jointly with Thomas Barber Johnson, and not by the defendant alone, nor by the two jointly and severally, but only jointly."

wards, and before this action, the plaintiff recovered against the said Thomas Barber Johnson, for and in respect of, amongst other things, his said claim for money payable to him by the said Thomas Barber Johnson, and for the said conversion to the Thomas Barber Johnson's own use, and the said wrongful deprivation of the plaintiff of the use and possession of the said household furniture, household utensils, and books by the said Thomas Barber Johnson, the sum of 100*l.*, with 136*l.* for costs of suit: That the said household furniture, household utensils, and books in the declaration in the said other action mentioned as aforesaid, were and are the same identical goods as the said goods which in the declaration in this action were described as household furniture, glass, linen, china, books, and plate; and that the conversion and deprivation thereof, whereof the plaintiff in the said other action complained as aforesaid, was and is the same as the conversion and deprivation thereof, whereof in this action he had in his declaration complained, and to which this plea was pleaded; and that the said claim in the said other action in respect of money payable for money received, included the plaintiff's said claim in this action for money payable for money received, and to which the plea was pleaded: And that the causes of action whereof the plaintiff in his declaration in the other action so complained as aforesaid, and in respect of which, amongst other things, he so as aforesaid recovered the said judgment, included all the causes of action to which this plea was pleaded, which judgment remained on record in the said court.

The plaintiff replied taking issue upon the first, second, and third pleas, and to the fourth and fifth replied *nul tiel record*.

The cause was tried before WILLIAMS, J., at the first sitting at Westminster in this term. The facts which appeared in evidence were as follows:—

The plaintiff had advanced money to the amount of 249*l.* to one Midgeley, and on the 29th of May, 1852, to secure those advances, Midgeley executed to him a bill of sale of his household furniture. Midgeley afterwards made a second bill of sale of the same goods to one Perkins, to whom he was indebted to the amount of 148*l.* Perkins, having seized the goods under his bill of sale, employed the defendant, who was an auctioneer, to sell them.

It appeared that there were two Johnsons, William Johnson, the father, and Thomas Barber Johnson, the son; but it did not distinctly appear whether they carried on business in partnership, or whether the son acted as the agent or servant of his father.

The goods were sold by Thomas Barber Johnson; but the father, William Johnson, the now defendant, was in the auction-room while the sale was going on, and he received the proceeds, amounting to 150*l.*, and, notwithstanding a notice from the plaintiff not to part with the money, paid with it Perkins's demand of 148*l.* The plaintiff, not then knowing

that the now defendant had received the money, sued Thomas Barber Johnson for money had and received, and for the conversion, and obtained a verdict and judgment against him for 100*l.* and 136*l.* costs; but the suit produced no fruits, Thomas Barber Johnson having taken the benefit of the insolvent debtor's act, and therefore this action was brought against William Johnson, the father.

On the part of the plaintiff, it was objected that the facts proved did not sustain the fourth plea, the money having been received by the now defendant only, and not by the father and son jointly; and that the plaintiff was at all events entitled to recover upon the count for money had and received, notwithstanding there might have been a conversion by the two.

The learned judge inclining to think this argument well founded, the defendant's counsel asked leave to abandon the plea, and plead *de novo*. The learned judge having declined to allow this, he was then asked to permit the plea to be amended, by striking out the words "the said debt for money received became due from, and was contracted by, the defendant jointly with Thomas Barber Johnson, and not by the defendant alone, nor by the two jointly and severally, but only jointly," and substituting for them the following, — "the said money was money received for and as being the proceeds of the sale of the goods in the last count and hereinafter mentioned."

It was then insisted by the defendant's counsel, that the recovery in the action against Thomas Barber Johnson was a bar to an action against the now defendant either for the conversion of the same goods, or for the recovery of the proceeds thereof. X X

The learned judge left the case to the jury, who found that the plea as amended was proved; and accordingly his lordship directed a verdict to be entered for the defendant, reserving leave to the plaintiff to enter a verdict for 148*l.* 15*s.*, if the court should be of opinion that the amendment was improperly allowed, or the plea as amended afforded no defence; and the court to say, if they thought the amendment ought to have been made, what terms, if any, should have been imposed.

Byles, Serjt., on a former day in this term, moved for a rule *nisi* accordingly.

A rule *nisi* having been granted,

Lush now showed cause.

Hawkins and *Fintason*, in support of the rule.

JERVIS, C. J. I am of opinion that this rule should be discharged. I think the plea was properly amended; and I think it was substantially proved, as amended. I also think that the objections to the amendment which have been now urged by Mr. *Hawkins*, should have been urged at the time, when, if there were anything in them, they might have been removed by a further amendment. There can be no doubt that the plea as amended was proved in substance; and I think it is equally clear that

my Brother WILLIAMS was quite right in allowing the amendment. The question which was substantially in issue between the parties, and which both went down to try, was, not whether the proceeds of the sale of the plaintiff's goods had been received by the defendant and his son jointly, but whether there had been a substantial recovery by the plaintiff in the former action, so as to bar his right to recover in this. As, therefore, the amendment raised substantially the real point in controversy between the parties, I do not think it ought to have been allowed only upon the terms of the defendant's paying the costs of the day. The sole remaining question, then, is, whether the plea as amended affords an answer to the action. I think it does. The authorities show, and indeed it is not denied, that, if Thomas Barber Johnson, the son, had received the money as well as converted the goods, and Buckland had sued him in trover, and obtained a judgment against him, even though it had produced no fruits, that judgment would have been a bar to another action against him for money had and received. Upon the same principle, if two jointly convert goods, and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion,¹ or an action for money had and received to recover the value of the goods, for which a judgment has already passed in the former action. Mr. *Finlason* says, that, as the plaintiff recovered only 100*l.* in the action against Thomas Barber Johnson, and the present defendant received 150*l.* as the value of the goods, the plea should at all events only be considered as a bar to the extent of 100*l.*: and for this he relies on *Hitchin v. Campbell*.² That case, however, does not sustain the position for which it was cited. It was an action for money had and received by the defendant for the use of the plaintiff; to which the defendant pleaded in bar, that the plaintiff had brought an action of trover against him and one A. B. to recover damages against him for divers goods and chattels of the plaintiff supposed to be converted by them to their own use, to which they pleaded the general issue, and a verdict was found for them (the defendants), and judgment was entered thereupon, which the present defendant now pleaded in bar to this action, and averred that the goods and chattels for which the action in trover was brought were the very same identical goods for the produce whereof (by sale) the present action was brought by the plaintiff against the defendant for money had and received for the plaintiff's use: and, upon demurrer, the court held that a judgment for the defendant in trover is no bar to an action for money had and received by the defendant for the use of the plaintiff. As the verdict for the defendants in the action of trover might have gone upon the ground that the sale of the goods took place with the plaintiff's authority, which, though it would

¹ *Brinsmead v. Harrison*, L. R. 7 C. P. 547, *accord.* *Lovejoy v. Murray*, 3 Wall. 1; *Elliott v. Hayden*, 104 Mass. 180, *contra.* — Ed.

² 3 Wils. 240; 2 Bl. W. 779.

negative the alleged conversion, would be no answer whatever to an action for money had and received, that case is obviously no authority on the present occasion. The whole fallacy of the plaintiff's argument arises from his losing sight of the fact, that, by the judgment in the action of trover the property in the goods was changed, by relation, from the time of the conversion; and that, consequently, the goods from that moment became the goods of Thomas Barber Johnson;¹ and that, when the now defendant received the proceeds of the sale, he received his son's money, the property in the goods being then in him. Some of the authorities do, indeed, seem to lay it down that it is not the recovery only, but the recovery coupled with the payment of the damages, that changes the property. Thus, in *Cooper v. Shepherd*,² TINDAL, C. J., delivering the judgment of the court, says: "The plaintiff in trover, where no special damage is alleged, is not entitled to damages beyond the value of the chattel he has lost; and, after he has once received the full value, he is not entitled to further compensation in respect of the same loss: and, according to the doctrine of the cases which were cited in the argument, by a former recovery in trover, and payment of the damages, the plaintiff's right of property is barred, and the property vests in the defendant in that action: see *Adams v. Broughton*,³ and *Jenkins*, 4th Cent., Case 88, where it is laid down, 'A., in trespass against B. for taking a horse, recovers damages: by this recovery, and execution done thereon, the property in the horse is vested in B. *Solutio pretii emptionis loco habetur*.'" But, in the fuller report of *Adams v. Broughton* in *Andrews*, 18, where an action of trover had been brought by Adams against one Mason, wherein he obtained judgment by default, and afterwards had final judgment, whereupon a writ of error was brought; and another action of trover was afterwards brought by Adams for the same goods for which the first action was brought against Broughton, the court, upon a motion to hold the defendant in the second action to bail, distinctly lay it down that "the property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world." By "damages recovered," the court evidently did not mean "paid," for a writ of error was then pending in the first action. And this is explained by the principle laid down by my Brother PARKE, in *King v. Hoare*,⁴ "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal

¹ *Brinsmead v. Harrison*, L. R. 6 C. P. 584, *contra*. — Ed.

² 3 C. B. 272.

³ 2 Stra. 1078.

⁴ 13 M. & W. 501.

maxim, '*transit in rem judicatam*,' the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus, it has been held, that if two commit a joint tort, the judgment against one is of itself, without execution, a sufficient bar to an action against the other for the same cause. *Brown v. Wootton*.¹ And though, in the report in *Yelverton*, expressions are used which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet, upon a comparison of all the reports, it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Chief Justice Popham, Cro. Jac. 74, states the true ground: he says, "If one hath judgment to recover in trespass against one, and damages are certain," (that is, converted into certainty by the judgment), "although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two, is, because there every of them is chargeable, and liable to the entire debt; and, therefore, a recovery against one is no bar against the other until satisfaction." And it is quite clear that the chief justice was referring to the case of a joint and several obligation, both from the argument of the counsel, as reported in Cro. Jac., and the statement of the case in *Yelverton*. We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort-feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action.² The right of action is merged in the judgment. It is the judgment that disposes of the matter, and not the payment.

MAULE, J. I also am of opinion that this rule should be discharged, and that the case was a very proper one for amendment at the trial. The amendment asked for and allowed did not alter the substance of the plea, or in any degree vary that which was the real question in controversy between the parties, viz., whether the plaintiff had recovered against one of two joint tort-feasors, so as to make that recovery a bar to a subsequent action against the other. That question was raised by the plea as it originally stood; and it was also raised by the plea as amended. I do not

¹ *Yelv.* 67; *Cro. Jac.* 73; *F. Moore*, 762.

² And see the judgment of *BAYLEY, B.*, in *Lechmere v. Fletcher*, 1 C. & M. 623.

think it was at all a case for the imposition of terms upon the defendant. Every plea is to be taken subject to such amendments as the law as it now stands permits the judge to make. Then the plea as amended seems to me to be a good plea; and, being proved, afforded a good defence to the action. It states, in substance, that the money sought to be recovered in this action was the proceeds of certain goods of the plaintiff which the now defendant and Thomas Barber Johnson had jointly converted, and that the plaintiff had sued Thomas Barber Johnson for that conversion, and recovered a verdict against him for 100*l.*, the value of the goods so converted. That seems to me to afford a substantial answer to the action. In an action of trover, the plaintiff may not always recover the full value of the thing converted; and, if it had been shown here that the plaintiff had not recovered the full value of the goods in question in the former action, I will not say what the consequences might have been. But here we must take it that the plaintiff did recover the full value in the former action. Having his election to sue in trover for the value of the goods at the time of the sale, or for the proceeds of the sale as money had and received, the plaintiff elected the former remedy, and he has obtained a verdict and judgment. He has, therefore, got what the law considers equivalent to payment, viz., a judgment for the full value of the goods. It appears upon the plea and upon the evidence, that the sum actually received by the present defendant as the proceeds of the sale exceeded the amount for which the plaintiff recovered judgment in the former action. But, when the plaintiff made his election to sue in trover for the value at the time of the sale, he was bound by the estimate of the jury. The circumstance of the present defendant's having been a joint converter, or a stranger, makes, I think, no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment, his remedy was altogether gone: his claim was satisfied as against all the world. He was in fact in the position of a person whose goods had never been converted at all. For these reasons, I think the rule should be discharged.¹

Rule discharged.

¹ The opinions given by CRESSWELL and CROWDER, JJ., in favor of plaintiff have been omitted. — ED.

L. 17. 18

ANDREWS v. HAWLEY.

IN THE EXCHEQUER, MAY 26, 1857.

[*Reported in 26 Law Journal Reports, 323.*]

THE declaration stated, that the plaintiff carried on business as a trader, and that certain persons were indebted to him ; that the defendant induced them by false and fraudulent representations to withhold from the plaintiff the monies due to him, or to discontinue dealings with him ; and that the defendant also, by fraudulently proceeding without the consent or authority of the plaintiff, and against his will, but using his name, obtained from certain persons divers sums due from them to the plaintiff, whereby the plaintiff was delayed in recovering the same, etc.

Second count for money received.

Pleas. Not guilty, and never indebted.

At the trial before CRESSWELL, J., at the last summer assizes for Surrey, it appeared that the defendant was an attorney who had, prior to September, 1854, been employed by the plaintiff to collect debts for him. At that time one Pugh was engaged as traveller for the plaintiff under some agreement, by which he was to be remunerated out of the profits. In September, 1854, Pugh (who it appeared was an uncertificated bankrupt), was discharged by the plaintiff, and soon after the defendant sent to the plaintiff, on Pugh's behalf, a written notice of "dissolution of partnership," and also addressed to the customers of the plaintiff a circular, stating that he was authorized by the firm of "Andrews & Pugh" to collect the debts of the firm, and demanding payment of their account. By this means the defendant received from one customer the sum of 100*l.* and from another 71*l.* There was evidence that the plaintiff had incurred an expense of 25*l.* in counteracting these proceedings, by sending out circulars, etc.¹

It appeared further, that Pugh was indebted to the defendant in a much greater amount than the sums received, and that they were paid over to Pugh. The plaintiff swore positively that he had never heard of any claim on the part of Pugh to be partner until he received the defendant's letter ; that he then called upon him and told him so, and distinctly stated that Pugh was not a partner ; that the defendant himself admitted that until then Pugh had described himself as a traveller, and not as partner, and that he, the defendant, always believed him to be traveller until he had been advised that he was a partner. For the defendant reliance was placed on the fact that he had consulted counsel on the question, and acted on counsel's advice ; but no written case laid before counsel was pro-

¹ But this was not stated in the declaration as special damage.

duced, and it did not appear on what statement of facts counsel had advised, further than that it was on an oral statement of Pugh. Moreover, the advice which the counsel gave was, that Pugh, as partner, was entitled to recover the debts, and the circular letter which counsel had suggested to be sent to the customers stated that the partnership had been dissolved, and that the debts were not to be paid to the plaintiff but to Pugh. And in a suit between the plaintiff and Pugh in equity, an interim order had been made restraining either party from receiving the debts.

The learned judge left it to the jury, whether the letters were written *bona fide* in consequence of counsel's opinion, that Pugh might legally authorize the defendant to use the plaintiff's name, or with the intention of leaving the customers to suppose that the plaintiff had actually authorized the defendant to write.

The jury found that the letters were not written *bona fide*, and the learned judge directed a verdict for the plaintiff. His lordship had expressed an opinion that the former part of the special count was not proved, nor any part of the special damage beyond the receipt of the money; but that at all events, either on the special count or the common count, the jury might give the amount of the sums received. The jury found for the plaintiff for 171*l*.

Shee, Serjt., had obtained a rule last term to set aside the verdict and for a new trial, on the grounds that the judge misdirected the jury in telling them that if the letters were fraudulently and not *bona fide* written they must find for the plaintiff on the latter portion of the first count, or on the second count, for 171*l*.; that the verdict was contrary to the evidence; that no fraud on the part of the defendant was proved, and that the judge should have so directed the jury; that the sum of 171*l*. was not recoverable on the common count, and that the judge should have so directed the jury; and also that the plaintiff could not recover on the ground that he had recovered the money from other parties.¹ The rule was also to arrest the judgment on the special count.

E. James and *Hawkins*, for the plaintiff. There was no misdirection, and the right question was left to the jury. Notwithstanding the relation of attorney and client between Pugh and the defendant, and the fact that the defendant took counsel's opinion, the question was whether the defendant acted *bona fide*.

[BRAMWELL, B. Undoubtedly the merely obtaining of counsel's opinion will not protect an attorney if he has not acted *bona fide*. And everything depends on the case laid before counsel, as to which there was here no evidence; and it does not appear that counsel would have given such advice had he known all that the defendant knew.]

¹ It appeared on the affidavits that the plaintiff had received a composition of 80*l*. on the debt of 100*l*. The rule was granted also on the ground of surprise, but on that ground it was not sustained.

[MARTIN, B. Nor did the defendant, in fact, follow counsel's advice, which was that Pugh might recover the debts, not that the defendant might represent that Pugh and the plaintiff authorized him to apply for them. That was a very different thing, and it is clear the learned judge at the trial thought so.]

There was ample evidence of *mala fides* on the part of the defendant, for there was evidence that he knew the falsehood of Pugh's pretence that he was a partner.

[MARTIN, B. There was no pretext for supposing a partnership.]

Then as to the amount of the verdict, the damages were unliquidated ; the jury might have given more than 171*l*.

[BRAMWELL, B. No doubt ; but did not the learned judge in effect direct the jury that if they found for the plaintiff, that was the proper measure or amount of damages ?]

He said they might find that amount ; not that they must.

[BRAMWELL, B. But is any substantial damage recoverable under the special count ? The debts are still recoverable, and a great part has been recovered by the plaintiff. There was no evidence that he was prevented from recovering damages, except that the actual receipt of the money by the defendant was negatived.]

The amount can be recovered, at all events, under the common count, on the principle that the tort may be waived, the debts having been recovered professedly on behalf of the plaintiff as well as Pugh.

[BRAMWELL, B. In this very action you are setting up the receipt as a tort, and are claiming to recover at all events nominal damages on a count of which that is the gist.]

The count for money received is separate, and on that count the defendant's receipt of the money may be adopted by the plaintiff.

[POLLOCK, C. B. The receipt was found to have been fraudulent, and to have been really on behalf of Pugh. It is therefore as if the money due to the plaintiff had been received by the defendant for Pugh. Now, does the doctrine of adopting a tort apply where it was not an act professedly done on the behalf of the party who proposes to adopt it ?]

The money was received professedly on the behalf of Andrews, the plaintiff, as well as Pugh, and the plaintiff can adopt the receipt as a receipt by his agent.

Shee, Serjt., and *Garth*, for the defendant, in support of the rule. There was no evidence of *mala fides*.

[BRAMWELL, B. There was abundant evidence of it. Assuming that the defendant did everything on counsel's advice, the evidence shows that the defendant knew more than it appears counsel did.]

[MARTIN, B. It also appears that the defendant did not confine himself to acting simply in accordance with counsel's advice, for there was a great difference between writing to the customers that Andrews and Pugh author-

ized him to apply for the debts, and merely writing that they must pay Pugh, which would have put the customers on their guard. Everything, again, was done behind the plaintiff's back.]

The action is not maintainable on the special count, even assuming fraud. The injury is to the debtors. They are bound to pay the plaintiff. It does not appear that he is in the least delayed, much less prevented from recovering. They can recover the amount from the defendant as money had and received; and if the plaintiff can recover it from the defendant as well as from them, the result will be that the defendant will repay it, and the plaintiff recover it twice over. All the actions for fraudulent representation, apart from special damages, are by the parties to whom the fraudulent representations have been made, and from whom money or goods have been obtained by means thereof.

[POLLOCK, C. B. Supposing that A. obtains the goods of B. from his bailee C. by a false representation to C., cannot B. sue A. for the conversion?]

That is a different case: it is a case of specific property, which has been converted and disposed of by the defendant, and of which the plaintiff has been deprived by the defendant.

[POLLOCK, C. B. No doubt the case of money is different in that respect, but do the cases differ in principle?]

It is conceived they do: for the damage is to the debtor, and he has the right of action.

[WATSON, B. Why should not the plaintiff have a right of action as well?]

Because he has sustained no damage. Why should he recover his debts twice over?

[POLLOCK, C. B. He ought not, and should refund what he has received of them twice over.]

But *non constat* that he may not recover the whole. The plaintiff can no more maintain this action than a banker could have sued a party for forging the signature of a customer to a cheque, before the forgery was made felony. Nor is the plaintiff in any better position on one count than the other; the second count is that the same case expanded on the record, which is proved under the common count; and if he cannot recover under one count, he cannot upon the other. No special damage that is alleged was proved, and the money claimed cannot be recovered, either as general damage under the special count, nor as money received to the plaintiff's use under the *indebitatus* count.

POLLOCK, C. B. We are all of opinion that the action is in some form maintainable, on the facts proved; and we are also all of opinion that there was no misdirection. The only question is as to the form of count on which the defendant is liable to the amounts claimed and the amount recoverable; as to which we think that the plaintiff certainly ought not to

recover from the defendant any sums he has received from his debtors; so that the verdict must be reduced by those amounts, whatever they are, as he cannot be allowed to recover them twice over. This, probably, will leave so little to be disputed, that the defendant would hardly press for a new trial, even if he were entitled to it.

BRAMWELL, B. There was no misdirection, nor was there any want of evidence. And beyond all doubt the defendant will have to repay the money he has received (so far as it has not already been received by the plaintiff from his debtors), leaving the defendant to recover it, if he can, from Pugh. The only question is, as to whether the claim is in the nature of special damage under the special count, or general damage, or money received to the plaintiff's use under the *indebitatus* count.

MARTIN, B. In my opinion it is recoverable as general damage under the special count.

WATSON, B. There was no misdirection, and there was abundant evidence. The only question is as to the form in which the money is recoverable.

Rule discharged.

JOHN CATTS, PLAINTIFF IN ERROR v. JAMES PHALEN & FRANCIS MORRIS, DEFENDANTS IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY TERM, 1844.

[Reported in 2 Howard, 376.]

THIS case was brought up by writ of error, from the Circuit Court of the United States for the District of Columbia and county of Alexandria.

The facts were these : —

The State of Virginia, in and prior to the year 1834, passed several acts authorizing a lottery to be drawn for the improvement of the Fauquier and Alexandria turnpike road.

In 1839, certain persons acting as commissioners made a contract with James Phalen and Francis Morris, of the city of New York, by which Phalen and Morris were authorized, upon the terms therein mentioned, to draw these lotteries. They proceeded to do so, and employed Catts to draw the tickets from the wheel. The following extract from the bill of exceptions sets forth the other facts in the case.

“That the plaintiffs (Phalen and Morris) before the drawing of such lottery, employed the defendant (Catts) to perform the manual operation of drawing with his own hand, out of the lottery wheel prepared for the purpose, the tickets of numbers therein deposited by them, in order to be drawn thereout by the defendant, without selection and by chance, as each ticket of numbers successively and by chance presented itself to his hand when inserted in the wheel, and which tickets of numbers, when so drawn

out in a certain order, were to determine the prizes to such lottery tickets as the plaintiffs had disposed of, or still held in their own hands, according as the tickets of numbers so drawn out corresponded with the numbers on the face of such lottery tickets respectively.

“That the defendant, before the drawing of the said lottery, and after he was employed to draw out the tickets of numbers as aforesaid, fraudulently procured and employed one William Hill to purchase of the plaintiffs, at their office in Washington, with money given by defendant to said Hill for the purpose, a certain ticket in the said lottery for him, the defendant, but apparently as for the said Hill himself.

“That the said Hill did accordingly purchase such ticket of the plaintiffs at their said office, apparently as for himself, and really for defendant, and with money furnished to said Hill by defendant as aforesaid, and delivered such ticket to defendant before the drawing of said lottery.

“That defendant, being in possession of such ticket so purchased for him as aforesaid, did, on the said — December, 1840, at the county aforesaid, undertake and proceed, in pretended pursuance and execution of his said employment in behalf of the plaintiffs, to draw out of the said lottery wheel, with his own hand, the said tickets of numbers, whilst at the same time he had fraudulently concealed in the cuff of his coat certain false and fictitious tickets of numbers fraudulently prepared by him, which exactly corresponded in numbers with the numbers on the face of the ticket so held by him as aforesaid, and fraudulently prepared in the similitude of the genuine tickets of numbers which had been deposited in the said lottery wheel for the purpose of being drawn out by defendant, without selection and by chance as aforesaid.

“That defendant, when, under pretence of drawing out such genuine tickets of numbers, he inserted his hand into the said lottery wheel, fraudulently and secretly contrived, without drawing out any of the genuine tickets of numbers deposited in said wheel, to slip between his finger and thumb the said false and fictitious tickets of numbers before concealed in his cuff as aforesaid, and produced and exhibited the same to the agent of the plaintiffs, and other persons then and there present and superintending the drawing of said lottery, as and for genuine tickets of numbers properly drawn from the said wheel; by reason of which fraudulent contrivance, the number of the lottery ticket so purchased for defendant, and in his possession as aforesaid, was registered in the proper books kept for that purpose by the plaintiffs, as the ticket entitled to a prize of \$15,000, so as to enable the holder of such ticket to demand and receive of the plaintiffs the amount of such prize, with a deduction of fifteen per cent.

“That the defendant afterwards, in the month of February, 1841, again fraudulently procured and employed the said Hill, in consideration of some certain reward to be allowed him out of the proceeds of such pretended prize, to present the said lottery ticket as a ticket held by himself to the

plaintiffs, at their office in New York, and there demand and receive of them as for himself, but for defendant's use and benefit, payment of the said pretended prize, and for that purpose the defendant delivered the said lottery ticket to said Hill, who did accordingly present the same to plaintiffs at their said office, and then and there received of them, as for himself and really and secretly for the defendant, the amount of such prize, with such deduction of fifteen per cent as aforesaid."

Phalen and Morris brought an action in the circuit court against Catts to recover back the amount which was thus paid, viz. : \$12,500. The declaration contained three counts, two of which were abandoned at the trial; the one retained being for money had and received by the defendant below (Catts) to the use of the plaintiffs.

The facts above set forth were not controverted, but the defendant relied upon a law of Virginia (to take effect from the 1st of January, 1837), passed for the suppression of lotteries; and also upon his being an infant, under the age of twenty-one years, when the lottery in question was drawn.

Whereupon the defendant prayed the court to instruct the jury as follows, to wit:—

"If the jury shall believe, from the said evidence, that the said lottery was drawn under the said act of the Commonwealth of Virginia, and the said contract so given in evidence as aforesaid, that then the said lottery was illegal; and if plaintiffs paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiffs cannot recover. And if the jury shall further believe, from the said evidence, that in December, 1840, when the said lottery was drawn, said defendant was an infant under the age of twenty-one years, that then the plaintiffs are not entitled to recover in this action."

Which instruction the court refused; to which refusal of the court the defendant excepts, and this, his bill of exceptions, is signed, sealed, and ordered to be enrolled, this 9th day of June, 1842.

The jury returned a verdict in favor of the plaintiffs for \$12,500, to bear interest from 15th March, 1841.

Upon this exception, the case came up to this court.

Cocce and *Semmes* for the plaintiff in error.

Jones and *Brent* for the defendants in error.

Mr. Justice BALDWIN delivered the opinion of the court.

Phalen and Morris brought an action in the court below, to recover from Catts the sum of \$12,500, which they alleged he had received for their use, and being so indebted, promised and assumed to pay, to which the plaintiff plead the general issue.

It appeared in evidence on the trial, that the legislature of Virginia had authorized lotteries, to raise money for improving a turnpike road in that State, which were placed under the superintendence of commissioners ap-

pointed under those laws, who by articles of agreement contracted with the plaintiffs to manage and conduct the drawing of the lotteries authorized by the laws, on certain terms therein stipulated, one of which took place in Virginia, under the circumstances set forth in the statement of the case by the reporter.

In the argument for the plaintiff in error here, it has been contended that this lottery was illegal by the suppressing act of 1831, which precluded a recovery of the money he received; but as, in our opinion, this cause can be decided without an examination of that question, we shall proceed to the other points of the case, assuming for present purposes the illegality of the lottery.

Taking, as we must, the evidence adduced by the plaintiffs below, to be in all respects true after verdict, the facts of the case present a scene of a deeply concocted, deliberate, gross, and most wicked fraud, which the defendant neither attempted to disprove or mitigate at the trial, the consequence of which is, that he has not, and cannot have any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and in point of law, he did not draw the lottery; his fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs, by means of any other false pretence; and he is estopped from avowing that the lottery was in fact drawn.

Such being the legal position of Catts, the case before us is simply this: Phalen and Morris had in their possession \$12,500, either in their own right, or as trustees for others interested in the lottery, no matter which; the legal right to this sum was in them; the defendant claimed and received it by false and fraudulent pretences, as morally criminal as by larceny, forgery, or perjury; and the only question before us is, whether he can retain it by any principle or rule of law.

The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to, or drew the prize; it was paid and received on the false assertion of that fact; the contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case, even if the instructions prayed by the defendant had been broader than they were. The instructions prayed were, 1. That if the jury believed from the evidence, that the lottery was drawn under the law of Virginia, and the contract referred to, then the lottery was illegal; and if plaintiffs paid the amount of said prize, under the belief that said ticket had been fairly drawn, the plaintiff cannot recover. 2. That if the jury shall believe from the evidence, that in December, 1840, when the lottery was drawn, the

defendant was an infant, the plaintiffs are not entitled to recover in this action.

A party cannot assign for error the refusal of an instruction to which he has not a right to the full extent as stated, and in its precise terms; the court is not bound to give a modified instruction varying from the one prayed: here they were asked to instruct the jury, that the belief of the plaintiff that the ticket had been fairly drawn, and the consequent payment, prevented a recovery, without referring to the fact in evidence, that that belief was caused by the false and fraudulent assertions of the defendant.

The second instruction asked was, that the plaintiffs could not recover, if the defendant was a minor in December, 1840, which the court properly refused, because they were not asked to decide on the effect of his minority when the money was received in February, 1841; and because, if he had then been a minor, it would have been no defence to an action founded on his fraud and falsehood.

The first instruction, if granted, would have excluded from the consideration of the jury, all reference to the fraud which produced such belief in the plaintiff, and they must have given it the same effect, whether it was founded in fact, or caused by the false asseveration of the fact by the defendant, knowing it was a falsehood, and thus depriving the jury of the right to decide on the whole evidence.

The second instruction asked would, if granted, have also taken from the jury the right of finding for the plaintiff, if the defendant had been of full age when the fraud was successfully consummated by the receipt of the money, which was the only fact on which the law could raise a promise to repay, for certainly none could be raised at any previous time; so that had these instructions been given, the verdict must have been rendered for the defendant without taking into view the only evidence on which the plaintiff relied, whether it was available in law or not.

For these reasons, the judgment of the circuit court is affirmed, with costs.¹

MALACHI THOMPSON v. EBENEZER B. HOWARD.

IN THE SUPREME COURT OF MICHIGAN, FEBRUARY 26, 1875.

[Reported in 31 Michigan Reports, 309.]

ERROR to Kalamazoo Circuit.

J. L. Hawes for plaintiff in error.

Arthur Brown, Dwight May, and Hoyt Post for defendant in error.

GRAVES, C. J. The plaintiff sued the defendant in case to recover of him for having, as he alleged, enticed into his service and harbored his minor

¹ *Northwestern Ins. Co. v. Elliott*, 7 Sawyer, 17, *accord.* — Ed.

son, a young man about nineteen years of age. The evidence went to show that the parties having been near neighbors in Cooper, Kalamazoo County, the defendant removed to Missouri, and, without plaintiff's knowledge or assent, and against his wishes and desire, persuaded and induced the young man to leave his father, the plaintiff, and go to defendant's place in Missouri, and there work for the latter on his promise of wages; that the defendant, besides holding out inducements to the young man to go and enter his service, furnished money to pay his fare, and that in consequence he went to Missouri about the 23d of May, 1870, and worked for defendant and remained there until April, 1871, when an elder brother, who was sent after him by plaintiff, induced him to return.

The main defence to the action consisted of evidence, admitted under objection, that shortly before this action was brought the plaintiff sued the defendant in assumpsit before a justice, to recover on the basis of contract for the minor's services; that the cause was brought to trial before a jury, and a hearing had upon the merits; that the case was submitted, but subsequently discontinued after a disagreement of the jury.

This course of the plaintiff, the defendant claimed, constituted a decisive election by the former to treat the transaction as one of contract and not tort, and he insisted the proceedings effectually put an end to any right the plaintiff may have had before, or might otherwise have had, to count upon the procurement of the young man to leave his father and serve defendant, as a tortious act.

In regard to this part of the case, the court told the jury in substance, that it was competent for the plaintiff to ignore the ground of tort involved in the defendant's arrangement with the minor, and to treat the transaction as one of contract between the plaintiff and defendant, to be enforced agreeably to its nature; and that if the jury were satisfied that the plaintiff, with full knowledge of all the facts going to show the defendant committed a tort, had yet elected to place his right on the basis of contract, and had prosecuted a suit on that theory and foundation down to the submission of the case to a jury, he could not afterwards turn round, repudiate such election, and maintain a suit in tort; but that if the plaintiff prosecuted his first suit in question in ignorance, or under misapprehension of the facts to show the tortious character of defendant's conduct in relation to the transaction, he would not be precluded from maintaining his action founded on the wrong.

The jury found for the defendant, and the plaintiff has brought error. The fact is undisputed, that before this suit the plaintiff prosecuted, as before mentioned, on the basis of agreement, for the purpose of recovering his son's wages. There is no controversy in regard to the proceedings then had. An objection was taken to the admission of the proof on two grounds, but the first is not noticed in the brief, and was not alluded to in argument; and the second must stand or fall with the charge which involves the same

point. As the case is presented, the judgment against the plaintiff must stand if the defendant's position in regard to the election of remedy prevails; because the facts upon which that position depends are in no manner questioned, and if the position itself is sound, the plaintiff was not entitled to recover, no matter what view might be taken of the other points made by him.

The general doctrine applicable to the feature of the case we are considering, appears to be well settled.

A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. *Broom's Max.*, 160; *Smith v. Hodson*, and notes; ¹ *Jewett v. Petit*; ² *Rodermund v. Clark*; ³ *Smith v. Baker*.⁴

As there was no evidence or claim that the parties ever actually agreed together at all in regard to the minor's services, it was not possible to refer the assumpsit to any real agreement of a date later than that of the defendant's supposed wrongful enticement, and not possible to infer that the assumpsit rested on a distinct arrangement, and left the original wrong as a ground for a separate suit.

The first action extended to the minor's services from the beginning; and when the plaintiff brought it, he thereby virtually affirmed that his son was with defendant in virtue of a contract between the latter and himself, and not by means of conduct which was tortious against him.

His proceeding necessarily implied that defendant had the young man's services during the time with plaintiff's assent, and this was absolutely repugnant to the foundation of this suit, which is that the young man was drawn away and into defendant's service against the plaintiff's assent.

The case is, then, subject to the doctrine before stated, and the election involved in the first suit precluded the plaintiff from maintaining this action for the wrong. The charge on this subject was sufficiently favorable to the plaintiff, and as this feature of his case was fatal to his right to recover, the other points require no notice.

The judgment should be affirmed, with costs.

The other justices concurred.⁵

¹ 2 *Smith's L. C.*

² 4 *Mich.* 508.

³ 46 *N. Y.* 354.

⁴ *L. R.* 8 *C.* P. 350; 5 *Eng. R.* 323.

⁵ It was held in *Nield v. Burton*, 49 *Mich.* 53, that one who had failed in an action of assumpsit for want of jurisdiction in the court in which the action was brought, could not afterwards sue in tort. — *Ed.*

C O U R T

NATIONAL TRUST COMPANY OF THE CITY OF NEW YORK,
RESPONDENT, v. VALENTINE GLEASON *et al.*, APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 27, 1879.

[Reported in 77 New York Reports, 400.]

APPEAL from judgment of the General Term of the Superior Court, of the city of New York, affirming a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the facts are set forth sufficiently in the opinion.

Ira Shafer for appellants.

Frederick Smyth for respondent.

RAPALLO, J. The complaint in this action avers that about the 5th of July, 1873, the defendants were possessed of certain documents purporting to be forty-two first mortgage bonds of the Buffalo, New York, and Erie Railroad Company, and that they obtained and received from the plaintiff \$30,000 on the deposit of said pretended bonds with the plaintiff as security, but the plaintiff afterwards discovered that said bonds were forged and worthless, wherefore it alleges that the defendants have had and received to and for the use of the plaintiff the sum of \$30,000, are indebted to the plaintiff in that sum. The complaint also contains averments excusing the plaintiff from tendering the bonds to the defendants, and demands judgment for the \$30,000, and interest.

The answers of the defendants who have answered deny the material allegations of the complaint, and the answer of the defendant Amelia A. Gleason sets up, in addition, that at the times of the transactions alleged in the complaint she was a married woman, the wife of the defendant Valentine Gleason.

The action was purely *ex contractu*, and one which, under the common-law system of pleading, would have been denominated an action of assumpsit for money had and received. No tort is alleged. There is no averment that the defendants had any connection with or knowledge of the forgery of the bonds, or that they were engaged in any conspiracy to defraud the plaintiff. No right or claim to damages for any wrong is set up, but simply an indebtedness for money had and received to the use of the plaintiff, or perhaps for money borrowed.

To maintain such an action it is necessary to establish that the defendants have received money belonging to the plaintiff or to which it is entitled. That is the fundamental fact upon which the right of action depends. It is not sufficient to show that they have by fraud or wrong caused the plain-

tiff to pay money to others, or to sustain loss or damage. That is not the issue presented in the action.

The plaintiff introduced evidence which, as is claimed, establishes that all the defendants were acting in concert, and were guilty in a greater or less degree of complicity in the forgery of the bonds. That the bonds were passed off upon the plaintiff by the defendant Charles Rolston, who received from the plaintiff the money advanced by it, and afterwards absconded.

Upon this evidence (throwing out of view the special questions raised as to the liability of the defendants who were married women, and of those defendants as to whom it is claimed that the evidence was insufficient to connect them with the forgery) it was a question of fact for the jury whether Rolston, in receiving the money, was acting in behalf of those engaged with him in the forgery, and was carrying out the common purpose with the authority and for the benefit of all his confederates. It was not necessary to establish that each defendant personally received a share of the proceeds of the bonds. If the whole proceeds were received by a common agent, those for whose benefit it was thus received were jointly liable for the entire sum: and this result would not be varied by the circumstance that the common agent failed to account, and absconded with the proceeds.

It was nevertheless a question of fact and not of law, whether the several defendants who were guilty of complicity in the forgery were interested in the money received by Rolston. Mere complicity in a forgery or other crime does not, as matter of law, render every guilty party liable in a civil action, *ex contractu*, for money had and received, or as borrowers, to every person who has been defrauded of money by means of such crime. To charge a party in an action of that character, the receipt of the money by him, directly or indirectly, must be established. His complicity in the crime is not the cause of action, but only an item of evidence tending to establish his interest in the proceeds.

These questions are fully presented in the case at bar, by exceptions to the charge, and by requests to charge. As to the defendants, Mrs. Gleason and H. S. Corp, they were also presented by a motion for a nonsuit. Among other grounds specified on that motion were the third, that as to Mrs. Gleason, who was a married woman, the plaintiffs had not shown that she had received any portion of the money obtained by Rolston from the plaintiff, or that any portion of it went to the benefit of her separate estate; and the sixth, that there was no evidence that either of the defendants participated in the money obtained by Rolston from the plaintiff. Before the charge was delivered the counsel for all the defendants requested the court to charge, among other things, second, that to entitle the plaintiffs to a verdict they must establish that the defendants directly or indirectly aided or assisted, or were in some way knowingly implicated in obtaining, through Rolston, the money from the plaintiffs; ninth, that if the jury believed that any defendant merely knew of the alleged intended crime of forgery, but

did not participate in it or receive any of the proceeds, the jury would not be justified in finding a verdict against him. The counsel for defendants Mrs. Gleason and Corp requested the court to charge : third, that the jury could not find a verdict against Mrs. Gleason unless they were satisfied on the evidence that the money obtained on the bonds passed to the defendant, or some part thereof, was received by her and went to the benefit of her separate estate ; fourth, that there was no direct evidence that Mrs. Gleason received any part of the money, or that any part of it went to the benefit of her separate estate ; eighth, that before the plaintiff can recover of either of the defendants in this action it must show that such defendant received some portion of the money obtained from the plaintiff on the forged bonds, either personally or by an agent, and if by an agent the agency must be proved, and in case of the absence or insufficiency of such proof as to any defendant such defendant was entitled to a verdict.

The court charged the jury, among other things, that the law of the case was, "that those who took part, a guilty part, no matter what that part was, how small or how great, in the commission of the forgery of the bonds of the Buffalo, New York, and Erie Railway Company, were responsible in this case for the money that was obtained on any part of those bonds by the defendant Rolston. That it was immaterial what the part taken was, provided anything was done by any one of the parties for the purpose of assisting in accomplishing the success of the forgery ; that each was responsible with the other."

In view of the requests made, directing the attention of the court to the point, it is very clear that the court held and instructed the jury, as the law of the case, that the mere fact of a person taking a guilty part, to any extent whatever, in the commission of a forgery, or in aiding in it, was sufficient to render him legally responsible, in an action for money had and received, to any person advancing money on the forged security ; and the case was in substance submitted to the jury, to be determined on the same principles as if the defendants were on trial on an indictment for forgery, or a conspiracy to defraud. However desirable it may be to render judgment against persons guilty of such offences, in any form of proceeding in which they may be brought before the court, whether civil or criminal, the law does not permit that indulgence of our desire to administer justice in the abstract, but confines us to prescribed forms of proceeding, applicable to particular cases. The right to a civil remedy is not under our statute merged in the crime, but the civil right of action must be made out. The alleged cause of action in this case is the receipt by the defendants of the plaintiff's money, and I think the eighth request to charge correctly stated the law, and the charge should have been given, viz. : that to maintain the action the plaintiff must show that the defendants received some portion of the money, either personally or by an agent, and if by an agent the agency must be proved. What should be sufficient evidence to authorize the jury

to infer such an agency, is a different question. This request was not granted, but as it was made only on behalf of Mrs. Gleason and Corp, the exception is available only to them. The exception to the charge however, that all those who took any guilty part in the commission of the forgery were liable for the money, was taken in behalf of all the defendants. That the meaning of the judge was that a guilty complicity in the forgery, irrespective of any actual or constructive receipt of the proceeds, would be sufficient to sustain this action, is clearly shown, and was conveyed to the jury, by the answer of the judge to the second request of all the defendants, viz. : that to entitle the plaintiffs to a verdict they must establish that the defendants directly or indirectly aided, assisted, or were in some way knowingly implicated, in obtaining through Rolston the money from the plaintiffs. To this request the judge replied that he so charged with this modification, "that when persons are engaged in the commission of a felony, the law is not very particular in ascertaining how far the consequences of that felony reach, to the knowledge of those persons, but if they commit a felony they are responsible for all the natural consequences that flow from that. Why do men forge bonds? They forge them for the purpose of having money obtained from honest people upon them. Now if, bonds being forged, even an unknown person should obtain money upon them, who is legally responsible? why the person who forged the bonds."

The rule was thus broadly laid down that any person who forges or aids in the forgery of an instrument is liable in an action *ex contractu*, for money had and received, to any person who may advance money upon the forged paper, without regard to the question who got the money, and even if the person is unknown. However sound the rule of responsibility laid down may be in respect to the criminal offence, or perhaps as applicable to an action for damages for an injury caused by the crime, it cannot be sustained as applicable to an action for money had and received or money borrowed. This modification was excepted to on behalf of all the defendants. To the ninth request on behalf of all the defendants, that if the jury believed that any defendant merely knew of the alleged intended crime of forgery, but did not participate in it or receive any of the proceeds, the jury would not be justified in finding a verdict against them, the judge replied: "That is the law, gentlemen, if you can imagine such a case, and if a party stands by during the commission of a felony or a part of it, and merely knows that it is going on and does not participate in it. There must be some assistance, by the presence, or by some act or advice or help of the party, to implicate in the crime, and if there is any act, as I said before, — any act or advice or assistance given, which is given for the purpose of effecting the felony, it makes the party doing that, or saying that, guilty of complicity."

That part of the request which touches the subject of the receipt of the proceeds, is not noticed, and in connection with the other parts of the charge it clearly appears that in the view of the learned judge, any advice

or assistance by presence, by saying anything, or otherwise, in the commission of a felony, whereby a third party is defrauded of money, is sufficient to make the offender liable in this form of action, no matter who receives the proceeds.

Not a single authority has been cited in support of the theory on which the case was submitted to the jury. All the authorities cited by the plaintiff's counsel relate to actions for conspiracies and torts, and in his points he treats this as an action for damages for a conspiracy. But it is impossible to sustain this position, as the complaint contains no allegations showing any wrong done by the defendants, but rests purely and simply upon the allegation that the defendants received the money which was advanced upon the forged bonds, and are indebted for it as money had and received to the plaintiff's use, and the point is expressly taken, throughout the trial, that the action cannot be maintained without proof of this essential allegation. If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible injury, or waiving the force he may maintain trover for the wrong, or waiving the tort altogether he may sue for money had and received. *POLLOCK, C. B., Rodgers v. Maw.*¹ And the rule is the same here, even if the goods are stolen. But to maintain the action for money had and received, the goods must have been turned into money and the defendant must have received the proceeds, directly or indirectly. To maintain such an action it is necessary that a certain amount of money belonging to one person should have improperly come into the hands of another, and there must be some privity between them.² It is difficult to conceive upon what legal principle a wife who merely aids and abets her husband in the commission of a forgery, or a mechanic who is employed to execute some part of the work and is paid for his services, having no concern with or interest in the fruits of the crime, can be held liable in an action *ex contractu* for money advanced upon the forged instrument, whatever may be their responsibility in a criminal prosecution for the offence.

As to Mrs. Gleason, an action *ex contractu* can be maintained against her only by showing that she is liable upon some contract made in a separate business carried on by her, or with reference to her separate estate, or for which she has charged her separate estate; and we think the point is well taken that there is no evidence of any such contract on her part, or at least that the question should have been submitted to the jury as requested. If there were evidence showing that she had received any part of the money, and the jury had so found, she might possibly have been liable on the ground that the money went to the benefit of her separate estate, but no such question was submitted. The only evidence affecting her, to which our attention is called, was to the effect that she was the wife of one of the

¹ 15 M. & W. 448.

² Addison on Con., 1062; Greenl. on Ev., §§ 120-122.

conspirators and was acquainted with the others, and that they were in the habit of meeting at the house where she resided with her husband, and part of the forging was done there, and that she was present when the forged seal of the Buffalo, New York, and Erie Railroad Company was delivered to her husband and examined by him, and that the forged cancelling stamp was delivered to her in a parcel to be delivered to her husband, though it does not appear that she knew what it was. These circumstances may tend to show some knowledge on her part of the transaction, but do not establish that she received any money for the benefit of her separate estate, nor make out a case of liability on her part in an action upon an implied contract.

The point relating to the incompetency of Pettis as a witness by reason of his conviction of a felony in the State of Massachusetts, is covered by the decision of this court in the late case of *Sims v. Sims*,¹ in which it was held that a conviction in another State did not render a person incompetent to be a witness here. We do not think that the circumstance that at the time Pettis was examined as a witness the term of his sentence had not expired, distinguishes this case from that of *Sims v. Sims*.

We have not examined the numerous exceptions to rulings upon evidence, nor to the refusal to dismiss the complaint as to particular defendants on the ground of the insufficiency of the evidence to connect them with the crime, as, for the reasons already stated, the judgment must be reversed. Many of the exceptions are covered by the views before expressed, which show that proof of a conspiracy between the parties and of their complicity in the crime, and of any facts tending to show that Rolston in receiving the money was acting as the common agent or for the common benefit of all and with their assent, were competent for the purpose of establishing that the defendants received the money for which they are sued, and that the payment of it to Rolston was virtually a payment to all for whom he was acting. These were the material questions which should have been submitted to the jury.

The judgment might be sustained against the defendant Rolston, as the uncontroverted evidence shows that he received the proceeds of the bonds, but as it is stated that he was not served with process and has not appeared, a separate judgment against him alone cannot stand.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

¹ 75 N. Y. 466.

DIETZ'S ASSIGNEE *v.* SUTCLIFFE, &c.

IN THE COURT OF APPEALS OF KENTUCKY, IN EQUITY, JANUARY 25, 1883.

[*Reported in 80 Kentucky Reports, 650.*]

BRECKINRIDGE and Shelby for appellants.

Morton and Parker for appellees.

No brief.

Judge PRYOR delivered the opinion of the court.

In the month of December, 1879, J. J. Dietz made an assignment of his stock of goods, consisting mainly of boots and shoes, to the appellant J. H. Shropshire. Prior to this assignment, the appellees, except W. S. Thorn & Co., instituted their action at law, and obtained attachments that were levied on the property of Dietz.

The assignee, upon his motion, was made a party defendant, and by an answer controverted all the grounds of the attachment. The actions by the appellees were in ordinary for goods sold and delivered. The appellant pleaded in each action that the goods sold to Dietz by the plaintiffs were sold on a credit, and their several accounts were not due when the suits were instituted. The appellees, in reply, and for the purpose of avoiding this defence, alleged that Dietz purchased the goods fraudulently, and for the fraudulent purpose at the time of not paying therefor; and further, that they were unable to identify the goods received by Dietz from them. A demurrer was entered to the several replications by the appellant, and the demurrer overruled. An issue was then tendered, and a judgment rendered for the appellees. The question arises in this case, as stated by counsel for the appellant, "Can a vendor from whom goods have been purchased on a credit, by means of fraudulent representations, upon discovering the fraud, and before the expiration of the time of credit, sue in contract for either the stipulated price or the reasonable value of the goods," etc.? It is well settled that where the vendor has been defrauded by his vendee, the former may elect to treat the contract as a nullity, and bring his action for the recovery of the specific property, or trover for their value; and this doctrine proceeds upon the idea that the contract of sale having been rescinded at the election of the vendor, he is still vested with the title.

Many of the authorities also go further, and maintain that, as the contract is void, or as the vendor may so treat it, he may sue in assumpsit upon a *quantum meruit* for the reasonable value of the goods. That the vendor is entitled to such a remedy the appellant denies, and counsel have called our attention to numerous authorities sustaining this view of the question. He maintains that it is settled by the weight of authority that, in cases of

wrongful taking, the law does not imply a promise to pay, and that this rule has but two exceptions:—

First. When the wrong-doer has sold the goods and received the money, then an action for money had and received may be maintained, and the amount received for them recovered, but not the value of the goods.

Second. When the wrong-doer has died, an action for goods sold and delivered may be brought against his executor, as at common law an action for a tort did not survive, and if *assumpsit* could not be maintained, the party would be without a remedy.¹

Nor do we see how, after the repeated adjudications of this court on the question, it is possible to say that the plaintiffs, on repudiating the contract for fraud, had not their election between contract and tort as to the form of action. The remaining question is, what is the effect of a waiver of the tort? “Does it restore the express contract which has been repudiated for the fraud, or does it leave the parties in the same condition as if no express contract had been made,—to such relations as result by implication of law from the delivery of goods by the plaintiff and their possession by the defendant? On this subject the decisions are conflicting, but I think the weight of authority, as well as the true and logical effect of the acts of the parties, is to leave the parties to stand upon the rights and obligations resulting from the delivery and possession of the goods.” See *Anderson v. Jones*; ² *Jones v. Gregg*.³

In *Weigand v. Sichel*,⁴ it is said: “Where a party fraudulently purchased goods on a credit, and gave his note due at a future day, the vendor, upon discovering the fraud, may bring his action immediately for goods sold and delivered.”

In this case the facts not only conduce to establish the fraud, but the proof is so strong as to leave no doubt in the mind upon that question. The fraud vitiated the entire contract as made between the parties, and the appellees, as is conceded in argument, could at once have maintained an action for the specific property; if so, and the contract as to the appellees could be treated by them as void, then we have the goods in the possession of and owned by the appellees delivered by them to the appellants’ as-

¹ A portion of the opinion containing a citation and discussion of cases has been omitted. — Ed.

² 37 Mo.

³ 17 Ind.

⁴ 4 Abb. App. Dec. 592. It is not accurate to say that the plaintiffs sought to avoid the contract of sale. It is the credit only that is sought to be avoided. It was the sale of goods which the plaintiffs by their action affirmed. It was, however, a sale where the credit was obtained by fraud, and in law amounted to a sale for cash. In stating it in their complaint, therefore, to be a sale, and for cash, the plaintiffs but stated the contract according to its legal effect. They did not seek to avoid the contract of sale. They endeavored, merely, by proof of the act of fraud, to reduce the transaction to a cash sale. The complaint and the proof were to the same purport. Hunt, J., in *Weigand v. Sichel*. — Ed.

signor, and by him taken away. Will not the law imply a promise, upon this state of fact, on the part of Dietz to pay to the appellees the reasonable value of the goods?

If the express contract is void, and can be treated as such by the appellees, how is it that the fraudulent vendee or his assignee can rely upon its terms to defeat the action for goods sold and delivered? The vendee will not be allowed to set up his own fraudulent act to defeat a recovery by his vendor. The assignee of this fraudulent vendee is relying on the special contract as a bar to the recovery, because by its terms the debts were not due at the time the several actions were instituted.

In order to avoid this defence, a state of fact is presented in the reply that, if true, renders that contract as to the appellees a nullity, and if void, it is no obstacle in the way of the action for goods sold and delivered.

The fact of the owner delivering his goods to the assignor of the appellant has no connection with any special contract as to the time at which the goods were to be paid for, or the value agreed upon by the parties. In other words, no express contract exists, and the action for goods sold can be maintained.

As to the claim of W. S. Thorn & Co., who are asserting claim to the specific property, we need only to say that the transfer to the assignee gives to the latter no greater right than the debtor had, and for that reason the judgment for Thorn & Co. was proper, the fraud being clearly established.

The judgment as to all the appellees is affirmed.

(C. C. C. C.)

THE CITY NATIONAL BANK OF DALLAS, RESPONDENT, v. THE
NATIONAL PARK BANK OF NEW YORK, APPELLANT.

IN THE SUPREME COURT OF NEW YORK, MARCH TERM, 1884.

[Reported in 32 Hun, 105.]

APPEAL by the defendant from a judgment entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

The action is brought to recover the balance due upon a deposit made by the plaintiff with the defendant. The answer admits all the allegations of the complaint, and sets up by way of counter-claim that in September, 1880, A. F. Hardie was president of the plaintiff's bank; that in that month the plaintiff's officers first discovered that Hardie was indebted to it in about \$30,000, which he was unable to pay, and for which he had imposed on the plaintiff worthless collaterals; that the officers and managers of the plaintiff took away from Hardie the management of the bank and kept

him as a figure-head merely until he should succeed in raising money enough to pay his debt to the plaintiff, and that the plaintiff, by its officers and agents, conspired with Hardie that he should set forth and obtain from whomsoever he could persuade to lend him, upon worthless collaterals, money enough to pay this indebtedness; that in pursuance of this conspiracy Hardie came to New York, and in September, October, and November, 1880, fraudulently borrowed of the defendant \$29,661 upon the faith of worthless collaterals; that at this time Hardie was insolvent, and that he borrowed the money with the preconceived intention not to pay for it; that the plaintiff retained Hardie in his office as president for the purpose of giving him credit until he had borrowed this money, and then dismissed him, and for the same purpose permitted him to transfer the plaintiff's account in New York to the defendant from another bank; that of the money thus obtained by Hardie the plaintiff and Hardie applied \$13,000 to pay a part of Hardie's indebtedness to it, or obligations of others upon which Hardie was liable; \$9338.33 being so applied October 4, 1880, and \$1000 October 27, 1880, and the rest of the \$13,000 at various dates between October 1 and December 1, 1880; that the balance of the money the defendant paid directly to Hardie, or to others at his request. The answer then demands judgment against the plaintiff for \$25,661 and interest.

Francis C. Barlow for the appellant.

Moore, Low and Sandford for the respondent.

DAVIS, P. J. The other grave question of the case,¹ to wit, the right to counter-claim in this action on the ground of joint conspiracy to defraud on the part of plaintiff and its president, was disposed of by the court by holding that damages for such a conspiracy, if established, could not be interposed as a counter-claim in this suit.

The defendant alleged that the plaintiff and Hardie conspired to defraud the defendant, and by means of such conspiracy Hardie obtained a large sum of money beyond that which is shown to have been paid by him to plaintiff, and sufficient facts are averred to maintain, if proved, an action of tort for fraud against the plaintiff and Hardie. Either of the conspirators would be liable to such an action for the damages sustained by the fraud. The defendant sought to waive the tort and proceed upon the implied contract to repay the money obtained by the fraud. This clearly could be done. *Harway v. The Mayor*; ² *Wood v. The Mayor*; ³ *Coleman v. The People*; ⁴ *Andrews v. Artisans' Bank*.⁵

But it is insisted, in substance, that such an action on the implied promise would be on a joint and not several contract, and that for that reason, inasmuch as Hardie is not a party to the action as plaintiff or otherwise, the implied contract cannot be set up in this suit as a counter-claim. We think the implied contract in such case which arises upon waiver of an action for

¹ A portion of the opinion discussing the question of notice has been omitted. — ED.

² 1 Hun, 628.

³ 73 N. Y. 556.

⁴ 58 N. Y. 555.

⁵ 26 N. Y. 298.

tort is joint and several and not joint alone. Such was the nature of the tort and each party could have been separately sued upon it, and the same reason extends to the implied contract. Either conspirator may be sued upon his implied promise, and be made to answer for the whole of the money obtained by the fraud consummated under the conspiracy. If this be so, when either conspirator brings an action against the injured party upon contract, we see no sound reason why his liability on an implied contract to pay the defendant the moneys fraudulently obtained may not be asserted against him as a counter-claim. It was error, therefore, to take the question of the defendant's counter-claim away from the jury, assuming that there was evidence sufficient to carry it to the jury, as we must, inasmuch as it was not withheld on any such ground.

The judgment should be reversed and a new trial granted, with costs to abide the event.

BRADY and DANIELS, JJ., concurred.

Judgment reversed, new trial ordered, costs to abide event.

W. C. C. C.

ANASTASIA NOLAN v. JAMES MANTON, ADMINISTRATOR OF
JOHN MANTON, DECEASED.

IN THE SUPREME COURT OF NEW JERSEY, JUNE TERM, 1884.

[Reported in 46 New Jersey Law Reports, 231.]

ON writ of error to the Middlesex Circuit.

Argued at February term, 1884, before BEASLEY, Chief Justice, and Justices DEPUE, SCUDDER, and VAN SYCKEL.

For the plaintiff in error, *E. Cutter* and *A. V. Schenck*.

Contra, *J. W. Beekman*.

The opinion of the court was delivered by

DEPUE, J. John Manton died January 6th, 1877, leaving a widow and several children surviving. At the time of his death there was to his credit in the Emigrant Industrial Savings Bank, in New York City, the sum of \$1007.43. The bank-book, which was the evidence of the deposit, was in his name alone. In January, 1878, the sum so deposited, with interest, amounted to \$1063.67.

After his death, his widow, without letters of administration, received this money from the bank in several sums, between January 27th, 1878, and March 6th, 1879. She intermarried with one Nolan in September, 1882. In May, 1883, the plaintiff, a son of the deceased, took out letters of administration on the estate of his father, and then brought this suit against Mrs. Nolan to recover of her the money. The action is in assumpsit for money had and received.

The evidence on the part of the plaintiff tended to show that the defendant obtained the money with the understanding that she was to hold it until an administrator should be appointed, and then account for it. On this presentation of the case, the defendant received the money on an express trust, upon an undertaking to pay it to an administrator when one should be appointed. This trust inured to the benefit of the administrator when letters of administration were taken out, and thereupon a contract to pay him was implied.¹ The motion to nonsuit was therefore properly denied, and the exception on that ground is not sustained.

The defendant, as part of her case, denied that she received this money on any such trust, or upon any trust whatever. She contended, and so testified, that the moneys deposited in the bank from time to time, and making up the account, were her moneys which she had earned, and that they were in fact deposited in the bank in the names of her husband and herself; that she did not discover that the bank-book was in her husband's name alone until after his death; that she demanded the money of the bank as money belonging to her, and that the officers of the bank, being satisfied that she was the "right owner," paid the money to her as such.

On this evidence the defendant's counsel asked the judge to charge that the payment to the defendant by the bank, and the receipt by the defendant of the money on a claim by the defendant that the said money was her money, would not raise an implied promise in law, on the part of the defendant, to pay the money to the plaintiff, and consequently that the action could not be maintained in the absence of proof of an express promise by the defendant to pay the same. The judge refused the request, and charged that if the defendant took the money from the bank when it was not hers, there was an implied assumption that she would return it when requested, whereupon the defendant took an exception.

The only question presented by this exception is whether, by the law of this State, an action for money had and received will lie where the defendant has not received the money in suit on a contract, express or implied, to hold it for the use of the plaintiff, — in other words, whether privity of contract, express or implied, is not necessary to give a plaintiff a standing in court to maintain the action.

The leading case in the English courts on this branch of the law is *Williams v. Everett*.² The facts in that case were these: One Kelly, residing abroad, was indebted to several persons in England. Among his creditors was the plaintiff, Williams. Kelly remitted bills to the defendants, his bankers, in London, with directions to pay the amount in certain specified proportions to the plaintiff and other of his creditors. Williams had also received a letter from Kelly, ordering payment of his debt out of that remittance. Williams showed the letter to the defendants, and offered an indemnity if they would hand over one of the bills to him. The defendants

¹ Com. Dig. "Action on the Case," E; 2 Greenl. Ev. § 119.

² 14 East, 582.

refused to indorse the bill or to act upon the letter, and afterwards received the money on the bills. Williams then brought his action against the defendants for money had and received to his use. At the trial he was nonsuited on the ground that, the defendants having renounced the terms on which the bills were remitted before the money was actually received, it was only money had and received to the use of the remitter of the bills. The nonsuit was sustained *in banc*, for the reason that there was no assent on the part of the defendants to hold the money for the purposes mentioned in the letter, and that, in order to constitute a privity between the plaintiff and defendants, an assent, express or implied, to receive the money for the plaintiff was necessary.

Vaughan v. Matthews,¹ is another precedent to the same effect. The plaintiff was administrator of Jane Vaughan, who died in March, 1843. The defendant was executor of Ann Vaughan, who died in March, 1844. Jane had lent to one Evans £150, and received from him, as security, his promissory note, payable, as was said by the plaintiff, to Miss Vaughan. After the death of Ann, the defendant, as her executor, brought suit against Evans on the note, alleging it to be payable to Miss Vaughans, and not to Miss Vaughan only, and as Ann survived her sister, she would have the right to enforce payment. Evans settled the action and paid the amount to the defendant. The plaintiff alleged that the letter "s" had been fraudulently added to "Vaughan," and that the defendant had wrongfully received payment from Evans of the promissory note, which really belonged to the plaintiff as administrator of Jane, the payee, who had furnished the consideration. For the defendant it was contended that, admitting the whole of the plaintiff's case as it was stated by him, an action for money had and received could not be maintained. The court directed a nonsuit to be entered. Lord DENMAN, C. J., delivering the opinion of the court, said: "The defendant received the money in his own right, in payment of a note which, if genuine, would have been his property as executor of Ann Vaughan. The payment was not in respect of a note to which, if genuine, the plaintiff would be entitled; nor can the defendant be considered as acting in any respect as his agent. The facts stated do not raise the legal inference that the money paid by Evans was had and received by the defendant to the use of the plaintiff. Evans may still be liable to the plaintiff for the money lent to him by Jane Vaughan, if not upon the note, and the defendant may be liable to refund to Evans the money paid by the latter under mistake or misrepresentation; but there is no contract, express or implied, between the plaintiff and the defendant."

There is also a series of decisions in the courts of New York of like import, which hold that where two claimants for the same money apply for payment to the party from whom it is due, and one of them is recognized as being entitled to it and is paid, to the exclusion of the other, who is, in

¹ 13 Q. B. 187.

fact, the one entitled to it, the latter cannot sue the former to recover the money of him, for the reason that the party receiving the money, having received it under a claim of right in himself, the law will not imply any contract or promise by him to hold the money for the use of the other, or to pay it over to him, and that therefore there is not, under such circumstances, any privity of contract on which to found the action. *Patriek v. Metcalf*:¹ *Butterworth v. Gould*; ² *Rowe v. Bank of Auburn*; ³ *Hathaway v. Town of Homer*; ⁴ *Decker v. Saltzman*.⁵

There are decisions in the courts of some of our sister States giving to the action of assumpsit, as an equitable action, a broader scope, and holding that to warrant the action there need be no privity of contract except that which results from one man having another's money, which he has not a right to retain *in foro conscientie*, and which he ought, *ex æquo et bono*, to pay over. But if we were disposed to advance the action up to those limits, we would be restrained by a precedent in this court, which is binding upon us. I refer to the case of *Sergeant and Harris v. Stryker*.⁶ The facts in that case were these: The sheriff of H. had offered a reward for the apprehension of a prisoner who had escaped from jail. Stryker arrested the prisoner and lodged him in jail. Sergeant and Harris, falsely representing to the sheriff that they had arrested the prisoner and were entitled to the reward, received it of the sheriff. Stryker then sued Sergeant and Harris for the money so received by them of the sheriff, as money received to his use. This court held that the action would not lie. The ground was that there was not between the parties any privity, express or implied, whereon to found the action. Chief Justice HORNBLLOWER, in delivering the opinion of the court, cited *Williams v. Everett*, *supra*, with approval, as a case decided upon great consideration. He re-affirmed the doctrine of that case, that privity of contract was necessary to the action, and that could arise only from the receipt of the money under an assent, express or implied, to hold it for the benefit of the plaintiff. That assent, he said, could not be implied in that case; "for the defendants, instead of receiving the money as the money of the plaintiff or for his use, claimed and received it as their own, and wholly deny the plaintiff's right to it." I cannot distinguish the case just cited from the case presented by this exception. There was, at the trial, evidence both ways, and we cannot, on this bill of exceptions, consider on which side the evidence preponderated. The defendant was entitled to the instruction that the action was not maintainable if, in the judgment of the jury, the money was received by her as her own money, under a claim of right to it and without any assent to hold it for the benefit of the estate, or the administrator, when an administrator should be appointed.

It was also insisted that this action was maintainable against the defend-

¹ 37 N. Y. 332.

² 41 N. Y. 450.

³ 51 N. Y. 674.

⁴ 54 N. Y. 655.

⁵ 59 N. Y. 275.

⁶ 1 Harr. 464.

ant as an executrix *de son tort*. But it will be observed that this suit is not on an action by a creditor to recover of the defendant as executrix in virtue of assets of the deceased in her hands, nor is she sued as executrix *de son tort*. The *gravamen* of the action is money had and received to and for the use of the plaintiff as administrator of the deceased, and the question presented by the record is whether the money was so received as to create, as between defendant and the plaintiff, that privity which is an essential element of such an action.

For the reason above given, the judgment should be reversed.

HANNAH M. BROWN, APPELLANT, v. ADELBERT BROWN,
RESPONDENT.

IN THE SUPREME COURT OF NEW YORK, MAY TERM, 1886.

[Reported in 40 Hun, 418.]

APPEAL from a judgment in favor of the defendant, entered in Columbia County upon the report of a referee.

This case came before the General Term upon the judgment-roll and without the evidence. The referee reported as follows:—

“*First*. That prior to and on and for some time after August 27, 1877, the plaintiff and defendant lived together as husband and wife at South Pownal, Vermont.

“*Second*. That while so living together the plaintiff was called by the defendant Annie Brown.

“*Third*. That on the 27th day of August, 1877, the defendant deposited in the Hoosac Savings Bank of North Adams, in the State of Massachusetts, \$1000 to the credit of Annie Brown, but with the understanding with the officers of the bank, that the sum so deposited should be payable to the order of himself.

“*Fourth*. That shortly thereafter the defendant gave to the plaintiff the bank-book issued by said bank and representing such deposit, with intent to transfer and assign to her the indebtedness of said bank on account of such deposit, and all control over the same.

“*Fifth*. That said book remained in the possession of the plaintiff, and was held by her as her own until a long time thereafter, when the defendant took the same from the plaintiff by force and against her will.

“*Sixth*. That the plaintiff and defendant thereupon separated, and did not afterwards live together as husband and wife.

“*Seventh*. That the plaintiff notified the officers of said bank that she was the owner of said book and the moneys represented thereby, and de-

manded payment of the same to herself, which was refused, whereupon she forbade payment of the same to the defendant.

"*Eighth.* That afterwards said defendant took said book to said bank, and surrendered the said book and drew all the moneys and interest due upon the account represented by said book, amounting in the aggregate to \$1077, and took and kept the same to his own use.

"As a conclusion of law I find that the defendant is entitled to judgment for his costs therein, which I accordingly direct."

The referee also found, in response to requests of the plaintiff: That the defendant made a valid gift to plaintiff of the book and of the title to the money represented by it. That the bank, upon payment to defendant, retained the book. The referee stated in his opinion, and the fact is implied in the referee's findings upon other requests of the plaintiff, that the rules of the bank required the production of the book as a condition of payment.

W. H. Silvernail for the appellant.

H. A. Johnson for the respondent.

LONDON, J. This case was decided in favor of the defendant by the application of the well-settled rule, that where two rival claimants demand payment, each in his own right, of the debt which the debtor owes to one of them only, if the debtor pays the wrong claimant, the debt due to the rightful creditor is not thereby affected, and he acquires no title to recover the money of the party who wrongfully claimed and received it. *Patrick v. Metcalf*; ¹ *Butterworth v. Gould*.² But this rule rests upon the basis that the wrongful claimant obtains the money upon his own independent claim; that in using his own he does not prejudice his competitors; that he does not exercise any right or title of which he has wrongfully divested his competitor; that he is not assuming any agency for him; that he is not in privity with him. *Carver v. Creque*; ³ *Peckham v. Van Wagenen*; ⁴ *Hathaway v. Town of Cincinnati*; ⁵ *Bradley v. Root*.⁶

Here the defendant had made an absolute gift of the bank-book, and of the title to demand and receive the money represented by it, to the plaintiff. When the defendant, by force and against the will of the plaintiff, took the bank-book from her, he knew that he had no title to it or the money represented by it. Whatever claim he might assert to the money he well knew rested upon his fraud, if not upon his crime. But he thus obtained the physical power and apparent authority to represent the plaintiff in the presentation of the book to the bank, and by the act of presenting the book he did represent that whatever title or authority she had in the matter was exercisable by him, and he thus obtained the money.

He can take no advantage from his own wrong, and since he could not, in the absence of any title from the plaintiff, lawfully, as against her,

¹ 37 N. Y. 332.

² 41 N. Y. 450.

³ 48 N. Y. 385.

⁴ 83 N. Y. 40.

⁵ 62 N. Y. 434.

⁶ 5 Paige, 632.

obtain the money except as her agent, he may not, with the proceeds in his pocket, deny that he obtained them in the only manner in which he could lawfully obtain them.

It is probable the plaintiff could have maintained an action against the bank, since the bank had notice of her rights. But it was open to the plaintiff to elect to adopt the acts of the defendant or repudiate them. He shall not be heard to plead his own turpitude, and is therefore estopped to deny that he did not assume to act as the agent of the plaintiff. She may waive the tort, adopt his acts, and compel him to restore their fruits.

It comes to the same result if we regard the defendant as trustee *ex maleficio*. He knew that by his gift the book and the money it represented, and the rights it conferred, were the plaintiff's. He took the book by force, exercised her rights, and obtained the money. It was his duty to do nothing with her property and her rights for his own advantage, and he is, at her election, her trustee *ex maleficio* of the proceeds of his acts of usurpation. He held the proceeds of the book by same title that he held the book, and as he had no title to the book he had none to its proceeds, and must account to the true owner. *Comstock v. Hier*.¹

The judgment should be reversed, new trial granted, referee discharged, costs to abide event.

BOCKES, J., concurred.

LEARNED, P. J. I concur in this result on the ground that the defendant, by taking away plaintiff's property by force, committed a tort (trespass or trover) for which he became liable. He remains liable still; and the amount collected by him, being the amount of the indebtedness expressed in the book, is the measure of the damages to which she is entitled.

Judgment reversed, new trial granted, costs to abide event. Referee discharged.

¹ 73 N. Y. 269.

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